TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 46

REX TRAILER COMPANY, INC., PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 11, 1955

CERTIORARI GRANTED MAY 23, 1955

In the

United States Court of Appeals

For the Seventh Circuit

No. 11139

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

REX TRAILER COMPANY, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

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1 Pleas of the United States District Court for the Southern District of Indiana, at the United States Court House in the City of Indianapolis, in said District, before the Honorable William E. Steckler, Judge of said District Court.

United States of America
vs.
Rex Trailer Company, Inc. } No. 2357 Civil.

Be It Remembered that heretofore, to-wit: at the May Term of said Court, on the 9th day of August, 1950, before the Honorable William E. Steckler, Judge of said Court, the following proceedings in the above case were had, to wit:

Comes now the Plaintiff, by its attorney, and files Complaint in the above-entitled cause, which complaint reads as follows:

2 IN THE UNITED STATES DISTRICT COURT
For the Southern District of Indiana,
Indianapolis Division.

United States of America
vs.
Rex Trailer Company, Inc.,
1201 East Georgia Street,
Connersville, Indiana. } No. 2357 Civil.

1

COMPLAINT FOR CIVIL DAMAGES.

(Filed Aug. 9, 1950. Albert C. Sogemeier, Clerk.)

Comes now the plaintiff United States of America and for cause of action against the defendant Rex Trailer Company, Inc., alleges and says:

(a) That jurisdiction is conferred on this court by the provisions of Title 50 United States Code Annotated, Sections 1635(b), (c) and (d).

(b) That the defendant is a corporation duly organized under the statutes of the State of Indiana, with its principal place of business located at 1201 East Georgia Street, Connersville, Indiana.

Count I.

That the defendant during the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the state of Oklahoma, did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining 1 Ross Carrier Company Straddle Truck, model 90-7056, serial 1940 USA 563821.

Count II.

That the defendant during the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the state of Oklahoma, did cause Ted J. Thompson to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining 1 Ross Carrier Co. Straddle Truck, model 90-7056, serial No. 1913, USA 563807.

3 Count III.

That the defendant during the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the state of Oklahoma, did cause Frank Scott to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining one Ross Carrier Straddle Truck, model 90-7056, serial 1935, USA 563816.

Count IV.

That the defendant during the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the state of Oklahoma, did cause James H. Wolverton to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining a ¼ ton Willys truck, U. S. No. 2032993, motor number 10709, serial No. 101622.

Count V.

That the defendant during the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the state of Oklahoma, did cause Will H. Nealey to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining a 1942 Dodge truck, engine T-214-18817.

Wherefore, in accordance with Title 50 United States Code Annotated, Sec. 1635(b) (1), plaintiff prays for judgment against defendant in the sum of $2000.00 on Count I, in the sum of $2000.00 on Count II, in the sum of $2000.00 on Count III, in the sum of $2000.00 on Count IV, and in the sum of $2000.00 on Count V, and in the total sum of $10,000.00 for all counts, together with plaintiff's costs herein and all other just and proper relief.

Matthew E. Welsh,
United States Attorney.

* * * * *

13 And afterwards, to-wit, at the May Term of said Court on the 1st day of October, 1952, before the Honorable William E. Steckler, Judge of said Court, the following further proceedings were had herein, to-wit:

Comes now the plaintiff, by its attorney, and files Motion for Summary Judgment, which reads as follows:

14 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2357) * *

MOTION FOR SUMMARY JUDGMENT.

(Filed Oct. 1, 1952. Maurice W. Graston, Clerk.)

Plaintiff moves the court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the complaint, on the ground that the affirmative defenses set forth in de-

fendant's answer are insufficient as a matter of law and that the brief in support of defendant's answer of former jeopardy admits there is no genuine issue as to any material fact, the plaintiff is entitled to judgment as a matter of law.

2. This motion is based upon:

(a) The points and authorities set forth in the attached brief in support of plaintiff's motion for summary judgment.

(b) Brief filed by defendant in support of defendant's answer of former jeopardy.

Marshall E. Hanley,
U. S. Attorney.

Copy mailed to Counsel 10/1/52.
M. E. H.

15 And afterwards, to-wit: at the May Term of said Court on the 9th day of October, 1952, before the Honorable William E. Steckler, Judge of said Court, the following further proceedings were had herein, to-wit:

Comes now the defendant, by its attorneys, and files Motion for Summary Judgment, which reads as follows:

16 IN THE DISTRICT COURT OF THE UNITED STATES.

* * * (Caption—2357) * * *

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

(Filed Oct. 9, 1952. Maurice W. Graston, Clerk.)

The defendant Rex Trailer Company, Inc. moves the Court for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure that the plaintiff take nothing by its complaint on the ground that plaintiff's motion for summary judgment and supporting brief filed October 1, 1952, admits the allegations of fact contained in defendant's affirmative answer among which is the following allegation:

"That the action is for a statutory penalty and does not seek a remedy for the collection of any obligation or indebtedness owing the United States of America."

The motion is based upon the authorities cited and quoted from in defendant's attached brief, in support of this motion and in opposition to plaintiff's motion for summary judgment.

Rex Trailer Company, Inc.,
By Bernard Stroyman,
Michael L. Fansler.

Fansler, Fauvre, Young & Chambers,
Of Counsel.

The undersigned acknowledges service and receipt of copy of the foregoing Motion this 9th day of October, 1952.

Marshall E. Hanley,
U. S. Atty.

17 And afterwards, to-wit: at the November Term of said Court on the 18th day of March, 1953, before the Honorable William E. Steckler, Judge of said Court, the following further proceedings were had herein, to-wit:

Come now the parties and file Stipulation, which reads as follows:

18 In the District Court of the United States.
(Caption—2357)

STIPULATION.

(Filed Mar. 18, 1953. Maurice W. Graston, Clerk.)

The parties hereto stipulate that the defendant may file an amended answer, and that the issues in the above entitled and numbered cause, made up by the Complaint and said Amended Answer thereto, be submitted to the Court for judgment on the pleadings and the motions for summary judgment by plaintiff and defendant, filed October 1 and October 9, 1952, respectively.

Marshall E. Hanley,
United States Attorney.
Fansler, Fauvre, Young & Chambers,
By Michael L. Fansler,
Bernard Stroyman,
Attorneys for Defendant.

March 17, 1953.

19 Comes now the defendant and files Amended Answer, which reads as follows:

20 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2357)

AMENDED ANSWER.

(Filed Mar. 18, 1953. Maurice W. Graston, Clerk.)

The defendant Rex Trailer Company, Inc. for answer to the plaintiff's complaint herein alleges and says:

1. That plaintiff's action herein although denominated "Complaint for Civil Damages" is an action for a statutory penalty and that the plaintiff by said complaint does not seek a remedy for the collection of any obligation or indebtedness owing to or the recoupment or recovery of damage suffered by the plaintiff.

2. That heretofore, to-wit: at the January Term 1949 in the District Court of the United States, for the Western District of Oklahoma, the grand jurors of the United States of America within and for said District returned an indictment in five counts against this defendant and Isadore Levy and one Sydney O. Sydney then in the employ of this defendant. Said indictment was in five counts and charged each of said defendants with the identical offenses charged in the five counts of the complaint herein. A copy of said indictment is attached hereto and made a part hereof and marked Exhibit "A".

3. That thereafter on the 28th day of April, 1949, this defendant appeared to said indictment and entered a
21 plea of nolo contendere to all of the counts of said indictment and it was there stated to the Court by the defendant's attorney that it had been agreed with the office of the Attorney General that "all matters affecting these defendants may be disposed of in this case", which statement was acquiesced in by the District Attorney.

4. That pursuant to said plea and agreement and on the 23rd day of June, 1949, an order and judgment was entered upon the five counts of said indictment finding this defendant guilty upon each of said counts and finding this defendant upon each count, the fine aggregating $25,000.00, a copy of which order, judgment and sentence is hereto attached and made a part hereof, marked Exhibit "B".

5. That this defendant has paid the fine adjudged against it by the above mentioned order and judgment.

6. That the trucks referred to in said indictment were advertised and offered for sale by the War Assets Administration at a fixed price and were sold first come first served to qualified purchasers; that in said advertised offer for sale, it was provided that certain agencies and persons would have priority rights in the purchase of the trucks offered. That those granted priority were Housing Expediter and CPA Certificate Holders, Federal Agencies, Certified Veterans World War II, R. F. C. for Small Business, States and Political Subdivisions and Certified Non-Profit Institutions, who were to have priority in purchasing rights at the advertised price in the order in which they are listed. The advertisement and order provided that, if all available trucks were not purchased by those having priority, certain manufacturers and dealers of construction mining and farm machinery were to have non-priority rights to purchase the trucks advertised and available at the advertised price.

22 7. That this defendant was at that time a dealer engaged in the business of buying, selling, repairing, and reconditioning construction, farm machinery and mining machinery and attachments, and maintained a place of business for the display, sale and repairing and reconditioning of such machinery and attachments, and said business was not maintained for the primary purpose of purchasing such equipment for scrap or in order to salvage useable parts for resale. That as such dealer, this defendant, under said advertisement and offer for sale, had the non-priority right to purchase any of the trucks offered at such sale, if any such trucks remained after the purchases by those having priority.

8. That the "false statements of a material fact in writing to the War Assets Administration", which this defendant and its employees were charged in said indictment with having brought about, were statements qualifying the persons named in each of the counts of the indictment for a priority right to purchase the trucks referred to in the indictment.

9. That all of the trucks advertised were sold at said sale to those having or claiming priorities, but that, if all of said trucks had not been sold, this defendant would have had the right under the terms of said sale to purchase said trucks at the advertised price as a non-priority purchaser.

10. That by reason of the facts above set forth, th plaintiff was not damaged and did not suffer any loss be cause of the sale of said trucks and received the full ad vertised offering price for the same, and had said truck not been sold to the persons who purchased them, the would have been sold at the same price to other priority o non-priority purchasers.

11. That the complaint herein, by reason of th
23 facts above alleged, seeks to recover a further penalt in addition to the fine and penalty adjudged agains and paid by this defendant, and therefore places this de fendant in jeopardy a second time for the same offens contrary to the provisions of the Fifth Amendment to th Constitution of the United States of America.

Wherefore, the defendant prays judgment and that th plaintiff take nothing and that defendant recover its cost

Bernard Stroyman,
Fansler, Fauvre, Young & Chamber
By Michael L. Fansler,
Attorneys for Defendan

24 Exhibit "A".

IN THE DISTRICT COURT OF THE UNITED STATES

For the Western District of Oklahoma.

United States of America, *Plaintiff.* vs. Rex Trailer Company; Isadore Levy; Sydney Owen Sydney, *Defendant.*	No. 15820.

INDICTMENT.

Violation: Section 80, Title 18, U. S. C. A.

At the January, 1949, Term of the District Court, of th United States for the Western District of Oklahoma, be gun and held at city of Oklahoma City in said district, o the 3d day of January, in the year of our Lord one thou sand nine hundred forty-nine the Grand Jurors of th

United States of America, within and for said District, having been duly summoned, impaneled, sworn, and charged to inquire into and true presentment make of all public offenses against the laws of the United States of America, committed within said District in said State of Oklahoma, upon their oath aforesaid, in the name and by the authority of the United States of America, find and present:

25 Cause to Be Made a False Statement to a Government Agency.

Count One.

During the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the State of Oklahoma, Rex Trailer Company, Isadore Levy and Sydney Owen Sydney did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining a Ross Carrier Company Straddle Truck, Model 90-7056, Serial 1940, USA 563821.

Count Two.

The Grand Jury further alleges:

During the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the State of Oklahoma, Rex Trailer Company, Isadore Levy and Sydney Owen Sydney did cause Ted J. Thompson to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining 1 Ross Carrier Co. Straddle truck, model 90-7056, Serial No. 1913, U. S. A. 563807.

Count Three.

The Grand Jury further alleges:

During the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the State of Oklahoma, Rex Trailer Company, Isadore Levy and Syd-

ney Owen Sydney did cause Frank Scott to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining one Ross Carrier Straddle Truck, model 90-7056, Serial 1935, U. S. A. 563816.

26 Count Four.

The Grand Jury further alleges:

During the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the State of Oklahoma, Rex Trailer Company, Isadore Levy, and Sydney Owen Sydney did cause James H. Wolverton to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining a ½-ton Willys truck, U. S. No. 2032993, motor number 10709, Serial Number No. 101622.

Count Five.

The Grand Jury further alleges:

During the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the State of Oklahoma, Rex Trailer, Isadore Levy and Sydney Owen Sydney did cause Will H. Nealey to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining a 1942 Dodge truck, Engine T-214-18817.

(Sgd.) Haskell B. Pugh,
Assistant United States Attorney.

[fol. 27] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 715

REX TRAILER COMPANY, INC., Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed May 23, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

27 Exhibit "B".

IN THE UNITED STATES DISTRICT COURT

For the Western District of Oklahoma.

The United States,
Plaintiff,
vs.
Rex Trailer Company,
Defendant.

No. 15,820
Criminal

ORDER OF JUDGMENT AND SENTENCE.

On this 23rd day of June, 1949, the defendant, Rex Trailer Company, appears by Isadore Levy and Sydney Owen Sydney, and by Charles E. Dierker, Esq., and Bernard Stroman, Esq., for sentence on finding of guilty to plea of nolo contendere heretofore entered to each of the first, second, third, fourth and fifth counts of the indictment herein. It is by the Court

Considered, Ordered and Adjudged that the defendant, Rex Trailer Company, for the offense by it committed, pay a fine unto the United States in the sum of Ten Thousand Dollars ($10,000.00), on each of the first and second counts of the indictment; pay a fine unto the United States in the sum of Five Thousand Dollars ($5,000.00) on the third count of the indictment, and execution is hereby awarded.

It is further ordered that execution herein be stayed for ten (10) days from this date, and imposition of judgment and sentence on the fourth and fifth counts of the indictment continued pending payment of fines imposed on each of the first, second and third counts of the indictment.

Sgd. Stephen S. Chandler, Jr.
District Judge.

28 IN THE UNITED STATES DISTRICT COURT

For the Western District of Oklahoma.

The United States, *Plaintiff*, vs. Rex Trailer Company, *Defendant*.	No. 15,820 Criminal.

ORDER OF JUDGMENT AND SENTENCE.

On this 12th day of July, 1949, the defendant Rex Trailer Company appears by Charles E. Dierker, Esq., its attorney, for sentence on finding of guilt to plea of nolo contendere heretofore entered to each of the fourth and fifth counts of the indictment herein. It is by the Court

Considered, Ordered And Adjudged that the defendant, Rex Trailer Company for the offenses by it committed as charged in the fourth and fifth counts of the indictment herein, pay a fine unto the United States in the sum of One Dollars ($1.00) on each of the fourth and fifth counts of the indictment, for all of which execution is awarded.

Sgd. Stephen S. Chandler, Jr.
District Judge.

33 And afterwards, to-wit: at the October Term of said Court on the 1st day of February, 1954, before the Honorable William E. Steckler, Judge of said Court, the following further proceedings were had herein, to wit:

The plaintiff's Motion for Summary Judgment and the defendant's Motion for Summary Judgment having a second time come before the Court for consideration, and the Court having further considered said motions and the briefs of the parties together with their oral arguments, and being fully advised in the premises now again overrules defendant's Motion for Summary Judgment and again sustains plaintiff's Motion for Summary Judgment for the reason that there is no genuine issue as to any material fact and that the plaintiff is entitled to a judgment as a matter of law.

It is, therefore, Ordered, Adjudged and Decreed that the motion of the plaintiff for Summary Judgment be and the same is hereby sustained, and the United States of America have and recover judgment of and from the Rex Trailer Company, Inc. in the amount of $10,000.00, together with the costs of this action.

(Signed) William E. Steckler,
United States District Judge.

41 And afterwards, to wit: at the October Term of said Court on the 2d day of March, 1954, before the Honorable William E. Steckler, Judge of said Court, the following further proceedings were had herein, to wit:

Comes now the defendant by its attorneys, and files Notice of Appeal, which reads as follows:

42 UNITED STATES DISTRICT COURT

Southern District of Indiana,

Indianapolis Division.

United States of America,
vs.
Rex Trailer Company, Inc. } No. 2357 Civil

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Notice is hereby given that the defendant, Rex Trailer Company, Inc. in the above entitled cause hereby appeals to the United States Court of Appeals for the Seventh Circuit from the judgment entered in this action on February 1, 1954.

Rex Trailer Company, Inc.
Bernard Stroyman,
Michael L. Fansler,
Irving M. Fauvre,
Michael D. Fansler,
David L. Chambers, Jr.,
By Michael L. Fansler,
Attorneys for Defendant.

43 Comes now the defendant, by its attorney and files Points on Appeal, which read as follows:

44 UNITED STATES DISTRICT COURT.
(Caption—2357)

DEFENDANT'S POINTS ON APPEAL.

(Filed Mar. 2, 1954, Maurice W. Graston, Clerk.)

The defendant, Rex Trailer Company, Inc., intends to rely on the following points in the appeal of the above entitled cause:

1. The judgment of the court sustaining plaintiff's motion for a summary judgment and denying defendant's motion for a summary judgment is contrary to law.

Rex Trailer Company, Inc.
Bernard Stroyman,
Michael L. Fansler,
Irving M. Fauvre,
Michael D. Fansler,
David L. Chambers, Jr.,
By Michael L. Fansler,
Attorneys for Defendant.

45 Comes now the defendant, by its attorneys, and files Designation of Contents of Record on Appeal, which reads as follows:

46 UNITED STATES DISTRICT COURT.
(Caption—2357)

DEFENDANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

(Filed Mar. 2, 1954, Maurice W. Graston, Clerk.)

The defendant hereby designates the following portions of the record and proceedings on appeal:

1. Plaintiff's complaint filed August 9, 1950.
2. Plaintiff's motion for summary judgment filed October 1, 1952.
3. Defendant's amended answer filed March 18, 1953.

4. Stipulation dated March 18, 1953.
5. Judgment entered August 26, 1953.
6. Defendant's motion to set aside judgment filed August 28, 1953.
7. Order setting aside judgment entered September 2, 1953.
8. Final judgment entered February 1, 1954.
9. Defendant's notice of appeal.
10. Defendant's supersedeas bond and entry showing filing and approval thereof and stay of execution.
11. Defendant's designation of contents of record on appeal.
12. Defendant's statement of points.

Rex Trailer Company, Inc.,
Bernard Stroyman,
Michael L. Fansler,
Irving M. Fauvre,
David L. Chambers, Jr.,
Michael D. Fansler,
By Michael L. Fansler,
Attorneys for Defendant.

49 UNITED STATES DISTRICT COURT.
(Caption—2357)

CLERK'S CERTIFICATE.

I, Maurice W. Graston, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript of the record and proceedings in the above-entitled cause, pursuant to the Defendant's Designation of Contents of Record on Appeal filed March 2, 1954, and the Plaintiff's Designation of Additional Portions of the Record to be included on Appeal filed March 11, 1954, now remaining among the records of said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, Indiana, this 19th day of March, 1954.

Maurice W. Graston,
Clerk, United States District Court,
Southern District of Indiana.

[fol. 17] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT—OCTOBER TERM, 1954, JANUARY SESSION, 1955.

No. 11139.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

REX TRAILER COMPANY, INC., Defendant-Appellant

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

OPINION—January 18, 1955.

Before Duffy, Chief Judge, Major and Finnegan, Circuit Judges

DUFFY, Chief Judge:

This action was brought by the United States government pursuant to § 26(b) of the Surplus Property Act.[1] The complaint contained five counts. Count 1 was as follows:

> "That the defendant during the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the state of Oklahoma, did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining 1 Ross Carrier Company Straddle Truck, model 90-7056, serial 1940 USA 563821."

Counts 2 to 5 inclusive are identical with Count 1 except as to the name of the person making the false statement and the description of the motor vehicle involved. Judg-
[fol. 18] ment was asked in the sum of $2,000 on each count.

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[1] § 26(b)(1) of the Surplus Property Act of 1944, 50 U.S.C.A. appendix, § 1635(b), repealed and re-enacted as § 209(b) of the Federal Property and Administrative Services Act of 1949, 40 U.S.C.A. § 489(b).

Both plaintiff and defendant moved for summary judgment and plaintiff's motion was granted. The District Court entered judgment in favor of plaintiff for the sum of $10,000.

Sec. 26(b) of the Surplus Property Act of 1944 grants to the United States civil remedies against "Every person who shall use or engage in * * * any fraudulent trick, scheme, or device, for the purpose of securing or obtaining * * * for any person any payment, property, or other benefits from the United States or any government agency in connection with the disposition of property under this Act * * * (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or * * *"

As a defense the defendant alleged that it had pleaded *nolo contendere* in a criminal action based upon the same events; that in said criminal action the indictment contained five counts that corresponded exactly with the five counts in the instant action; that on June 23, 1949, as a result of its plea, a fine was imposed and defendant has paid an aggregate sum of $25,000; that plaintiff was not damaged and did not suffer any loss as it received the full offering price for the vehicles; that although the complaint was denominated "complaint for civil damages" this action is, in fact, one to recover penalties, and, therefore, is barred by the prohibition against double jeopardy contained in the Fifth Amendment to the United States Constitution.

Defendant was a dealer engaged in buying, selling and repairing farm machinery and mining machinery. Under the advertisement and offer of sale, it had a non-priority right to purchase the motor vehicles thus offered for sale if any such remained after those having priority had been given an opportunity to purchase. The "false statements" charged were the statements qualifying the persons named in each of the counts for a priority right to purchase. At the sales in question all vehicles advertised were sold to those having or claiming priorities.

The Fifth Amendment guarantees that no person shall "* * * be subject for the same offense to be twice put in jeopardy of life or limb." However, "Congress may im-

pose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause pro-[fol. 19] hibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." *Helvering* v. *Mitchell*, 303 U. S. 391, 399.

As stated in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 548, "The application of the double jeopardy clause to particular cases has not been an easy task for the courts." In the same case, the court, page 549, quotes from *Helvering* v. *Mitchell, supra*, as follows: "The question for decision is thus whether * * * (the statute in question) * * * imposes a criminal sanction. That question is one of statutory construction." In other words, we must here endeavor to ascertain the legislative intent.

The section in question was enacted shortly after the decision of the Supreme Court in *Marcus* v. *Hess, supra*. We may assume that the framers of § 26(b) were aware of that decision when they formulated § 26(b). It should be noted that the statute specifically describes subsection (b) as providing "civil remedies". The section contains subsections 1, 2 and 3. The latter two provide only for multiple damages and are, without question, compensatory in nature. It is very doubtful that Congress intended to have the first of the three subsections a penal section. In fact, the pertinent committee report (S. Rep. No. 1057, 78th Cong., 2d Sess. p. 14) states that the United States has "* * * the option of selecting among three different measures of damages, * * *" It is a reasonable construction that Congress intended all three subparagraphs of § 26(b) to be *in pari materia*. It is also of significance that § 26(d) expressly provides that the "civil remedies provided in (§ 26) shall be in addition to all other criminal penalties and civil remedies provided by law."

If § 26(b)(1) is of a penal nature the imposition of such penalty in addition to the sanctions provided by the criminal code, contravenes the prohibition against double jeopardy. Of course, statutes are to be construed, if possible, to avoid constitutional issues. *United States* v. *Congress of Industrial Organizations, et al.*, 335 U. S. 106, 120-121; *Guessefeldt* v. *McGrath, etc.*, 342 U. S. 309, 319.

Both sides discuss and the Government strongly relies upon *Marcus* v. *Hess, supra*. There the defendant had pleaded *nolo* to an indictment to defraud the United States, and had paid the fine which was imposed. Thereafter, an action was brought under the False Claims Act (31 U.S.C. [fol. 20] 231) which contains language quite similar to § 26(b). It provides that a person who commits certain frauds upon the United States "* * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained * * * together with the costs of the suit; * * *" And, as here, the defendant sought to defend the civil action on the ground that the statute prescribed a penalty and that the double jeopardy provision of the Fifth Amendment barred the proceeding under the False Claims Act.

The court held that the provision that the Government was to recover $2,000 and double damages for each fraud in violation of the statutes was remedial and not penal. The court (317 U.S. 549) said: "It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction * * * We cannot say that the remedy now before us requiring payment of a lump sum (of $2000) and double damages will do more than afford the government complete indemnity for the injuries done it."

This construction by the Supreme Court of the statutory provision for the payment of $2000 plus double damages is, indeed, persuasive as to the construction to be given to § 26(b)(1). Both provisions relate to frauds upon the Government. The False Claims Act pertains to frauds in connection with claims submitted to the government. Sec. 26(a)(1) deals with frauds in procuring property from the government. Indeed, the language "forfeit and pay" in the False Claims Act is stronger than the language "pay" in § 26(a)(1). As the Supreme Court held that "forfeit and pay" did not convert the $2000 payment plus double damages provision in that Act to a penalty it seems to follow that it would also construe the milder provision of "pay" in § 26(a)(1) in the same manner.

We think the decision of *Helvering* v. *Mitchell, supra*,

also indicates that § 26(a)(1) does not provide a penalty. In that case there had been a prosecution of defendant for fraud under the tax laws. Defendant sought to defend against the government's claim for an additional 50% over the tax owed, on the ground that its recovery was barred by the prohibition against double jeopardy. The court, pointing out that the basic question was one of statutory construction, held that Congress intended the 50% provision as a civil and not a criminal sanction.

[fol. 21] The Court of Appeals for the Fifth Circuit, in *United States* v. *Weaver, et al.*, 207 F. 2d 796, held that § 26(a)(1) was compensatory and not penal. That case involved the statute of limitations but whether the section was penal or compensatory was of prime importance in making the decision. The court said, pages 797-798: "This is not a criminal prosecution; it is not a civil action for a penalty; it is a civil action to recover an award of damages of a compensatory nature, payable to the United States for injuries to its property rights."[2]

In *Marcus* v. *Hess, supra*, page 548, the court pointed out the difference between civil remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice, and that only the latter subject the defendant to "jeopardy" within the constitutional meaning. The defendant argues that the government here has not suffered a financial loss and hence the *Marcus* case cannot be considered as authority against its contentions. Defendant argues that the decision in the court below was on a motion for summary judgment and, therefore, we must consider as true, defendant's allegation that the United States suffered no actual financial loss because the priority pur-

---

[2] The Court of Appeals for the Sixth Circuit in *United States* v. *Witherspoon*, 211 F. 2d 858, held that § 26(a)(1) was penal. It is interesting to note that the opinion made no mention of *Helvering* v. *Mitchell, supra*, or *Marcus* v. *Hess, supra*, nor why these decisions which we regard as persuasive, were regarded by that court as inapplicable. In our judgment the *Witherspoon* case was incorrectly decided.

chasers actually paid the offering price. Defendant insists that if this action involves more than making the United States whole for actual financial loss, it involves punitive elements.

We may concede that if veterans and all others having priority did not purchase the motor vehicles advertised, that defendant or other persons having no priority might have purchased same. However, such assumption ignores realities. The shortage of civilian motor vehicles in 1946-7 was very acute and was well known. Motor vehicles made up a large portion of the surplus property set aside for the exclusive use of veterans. The objectives of the Surplus Property Act in 1944 were to facilitate and regulate the orderly disposal of surplus property while giving effect to 20 enumerated purposes, among which were (f) the giving of an opportunity to returning veterans to estab- [fol. 22] lish themselves in business, agriculture or professional life and (h) the discouragement of disposal of surplus property to speculators.

We think the government was damaged in several respects and in a manner difficult to assess in monetary damages. The government wished to sell its surplus motor vehicles to certified veterans in order to assist in their reassimilation into civil life, and it was natural that the prices and conditions under which the government was willing to make these sales to veterans was more favorable than in the market place where gray and black market conditions were not uncommon. Defendant's fraud caused the government to deal with a class to which it did not desire to sell its surplus motor vehicles. Further, by its conduct if there were any vehicles left after supplying the wants of service men, various agencies of the Federal Government had next priority. If the supply was exhausted by frauds such as perpetrated by the defendant there was no other place for Government Agencies to purchase needed vehicles except on the open market.

It is well settled that in addition to actual losses the government is entitled to reimbursement of costs in connection with ferreting out and investigation of the frauds. *Helvering* v. *Mitchell*, *supra*, p. 401; *Stockwell* v. *United States*, 13 Wall. 531, 547.

We hold that § 26(a)(1) is not penal in nature and that the judgment entered in favor of the government must be and is

Affirmed.

[fols. 23-24] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11139

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

REX TRAILER COMPANY, INC., Defendant-Appellant

JUDGMENT—January 18, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

[fols. 25-26] [Clerk's Certificate to foregoing transcript omitted in printing.]

LIBRARY
SUPREME COURT, U.S.

In the

Supreme Court of the United States

October Term, 1954

No. [redacted] 816

REX TRAILER COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the

Supreme Court of the United States

OCTOBER TERM, 1954

No.

REX TRAILER COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Rex Trailer Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on January 18, 1955.

Citation to Opinion Below

The District Court did not render an opinion. The opinion of the Circuit Court of Appeals, printed in Ap-

pendix A hereto, *infra*, pp. 11-18, is reported at 218 F. (2d) 880.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on January 18, 1955. R., attached to clerk's certificate; Appendix A, p. 19, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented

Whether civil recovery by the United States from petitioner of the statutory sum of $2,000 for obtaining surplus property by fraud on each of the five counts of complaint based on Section 26(b)(1) of the Surplus Property Act of 1944 is barred by the prohibition against double jeopardy of the Fifth Amendment by reason of the prior criminal indictment against petitioner for the same offenses and its payment of the fines imposed, when on the admitted facts the United States suffered no pecuniary loss or damage.

Statute Involved

The statute involved is Section 26 of the Surplus Property Act of 1944 (58 Stat. 780, 50 U. S. C. App., Section 1635),[1] the pertinent portion of which provides:

> (b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connec-

[1] Section 26 of the Surplus Property Act of 1944 was repealed and reenacted as Section 209 of the Federal Property and Administrative Services Act of 1949 (63 Stat. 392, 40 U. S. C., Section 489).

tion with the disposition of property under this Act;

* * *

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

* * *

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

Statement of the Case

Respondent's civil complaint against petitioner in five separate counts was brought pursuant to the provisions of Section 26(b)(1) of the Surplus Property Act. Jurisdiction in the District Court was conferred by Section 26(c) of that Act. Count I of the complaint alleged that during the week of June 17, 1947, at Tinker Field, near Oklahoma City, Oklahoma, petitioner "did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration" for the purpose of obtaining a certain described motor truck (R. 2). Counts I through V of the complaint are identical with Count I except as to the name of the person making the false statement and the description of the motor trucks involved. Judgment was asked in the sum of $2,000 on each count, or a total of $10,000 (R. 2-3). No damage to respondent was alleged in the complaint.

Petitioner in its amended answer pleaded that the action was to recover a statutory penalty and not "for the collection of any obligation or indebtedness owing to or the recoupment or recovery of damage suffered by the (United States)" (R. 6), and that petitioner had previously been

indicted[2] in five counts with the identical offenses charged in the complaint, to which indictment it had pleaded *nolo contendere* and upon which a total fine of $25,000 was imposed on June 23, 1949, by the District Court of the United States for the Western District of Oklahoma and paid by petitioner (R. 6-7, 8-11).

Petitioner in its amended answer further alleged that the trucks in question "were advertised and offered for sale by the War Assets Administration at a fixed price and were sold first come first served to qualified purchasers;" that in the advertised offer for sale those granted priority of purchase were the "Housing Expediter and CPA Certificate Holders, Federal Agencies, Certified Veterans World War II, RFC for Small Business, States and Political Subdivisions and Certified Non-Profit Institutions" in that order of priority, and that if all available trucks were not purchased by those having priority, certain manufacturers and dealers of construction, mining and farm machinery were to have non-priority rights to purchase the trucks at the advertised price and that petitioner was such a dealer (R. 7). It was further alleged that the "false statements of a material fact in writing to the War Assets Administration" charged in the indictment were statements qualifying the persons named in each of the counts for a priority right to purchase, and that at the advertised sale all of the trucks were sold to those having or claiming priorities (R. 7).

In conclusion, it was alleged that respondent was not damaged and did not suffer any loss because of the sale of such trucks and received the full advertised offering price, and if the trucks had not been sold to the persons

---

[2] The indictment was brought under 18 U. S. C., 1940 ed., Section 80, 35 Stat. 1095 (R. 8).

purchasing the same, they would have been sold at the same price to other priority or non-priority purchasers, and that the complaint seeks to recover a further penalty in addition to the fine and penalty adjudged and paid by petitioner, thereby placing it in double jeopardy contrary to the Fifth Amendment (R. 7-8).

Both parties moved for summary judgment on the pleadings, and the District Court granted respondent's motion and overruled that of petitioner (R. 12). Judgment was thereupon entered that respondent recover from petitioner the sum of $10,000 and costs (R. 13).

Reasons for Granting the Writ

1. The decision of the court below in this case holding that Section 26(b)(1) of the Surplus Property Act of 1944[3] is not penal in nature is in conflict with the decision of the Sixth Circuit Court of Appeals in *United States* v. *Witherspoon*, 211 F. (2d) 858. In that case it was necessary to determine whether Section 26(b)(1) was penal and subject to the five-year limitation provision of 28 U. S. C., Section 2462. The court in holding that provision for the payment to the United States of $2,000 for each fraudulent act in violation of the statute imposed a penalty stated at pp. 861-862:

> "The statute itself distinguishes between the sum of $2,000 required to be paid for each fraudulent act in violation of the statute, and the damages, which are also recoverable." * * *
>
> * * * * *
>
> "The exaction of the arbitrary sum of $2,000 for each offense of obtaining, by fraud, surplus property,

[3] The printed opinion below as certified in a number of instances mentions Section 26(a)(1), although it is clear that Section 26(b)(1), which is the statute involved, is the intended citation. This error is corrected in the reported opinion at 218 F. (2d) 880.

> without regard to its value, is a provision for a penalty. Its purpose is, obviously, to punish an offense against the public justice, in addition to double the amount of all damages suffered by the government."

The court in *Witherspoon* then noted that the decision of the Fifth Circuit Court of Appeals in *United States* v. *Weaver*, 207 F. (2d) 796, also involving a question of limitations, was to the contrary. Both *Witherspoon* and *Weaver* are referred to in the opinion below, and in footnote numbered 2 (Appendix A, *infra*, p. 16) the court states, "In our opinion the *Witherspoon* case was incorrectly decided." This conflict among the circuits as to whether the provision in Section 26 (b)(1) of the Surplus Property Act for payment of $2,000 to the United States for each fraud in addition to double damages is penal or remedial should be resolved by this Court.

2. The decision below in rejecting petitioner's plea of double jeopardy fails to give proper effect to the scope of the Fifth Amendment which guarantees that no person "shall be subject for the same offence to be twice put in jeopardy of life or limb." On the admitted facts, the proceeding herein is not for the collection of any obligation or indebtedness owing to respondent, or the recoupment or recovery of damage suffered, and respondent had sustained no financial loss or damage (R. 6, 8). In the absence of any damage to respondent, the instant action which seeks to recover the arbitrary statutory sum of $2,000 on each of five counts is in fact punitive and not remedial, and by reason of petitioner's previous indictment and payment of criminal fines imposed for the same offenses, the action although civil in form is barred by the double jeopardy clause. See *United States* v. *Chouteau*,

102 U. S. 603, 611; *Coffey* v. *United States*, 116 U. S. 436, 445; *United States* v. *LaFrance*, 282 U. S. 568, 574.

The decisions by this Court in *Helvering* v. *Mitchell*, 303 U. S. 391, and in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, relied upon by the court below, do not support the recovery of statutory civil sanctions granted the Government as against a plea of double jeopardy where the Government has suffered no financial loss. In the *Mitchell* case this Court upheld a 50% tax fraud penalty as a remedial sanction "provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." (303 U. S. 391, 401.) The loss there was to the public revenue and the expense that of ferreting out the taxes fraudulently evaded. The *Mitchell* case is not authority that respondent may recover in this civil action the flat rate of $2,000 for each offense to reimburse the Government for expense incurred in the criminal proceedings.

United States ex rel. Marcus v. *Hess*, 317 U. S. 537, is discussed and quoted at length in the opinion below and needs little or no elaboration here. However, it is to be pointed out that the action in the *Hess* case, based on the False Claims Act (31 U. S. C., Section 231), was to recover damages for defrauding the Government through the use of fraudulent collusive bids. Such collusive bids by their very nature damaged the Government in its civil or proprietary capacity. The action there did no more than make the Government whole for actual loss. See concurring opinion of Mr. Justice Frankfurter, 317 U. S. 537, 553.

The Government in this case suffered no financial loss

on the admitted facts. The full offering price for the motor trucks was paid by priority purchasers or those claiming to have priorities. Even if it be assumed that the shortage of motor vehicles in 1946-47 is so well known that it may be judicially noticed, there is nothing in this record to support the assertion of the court below that the prices and conditions upon which the Government was willing to make the sales in question to veterans "was more favorable than in the market place." There is no evidence of a market price or that the offering price was less than the current market price.

Moreover, petitioner under the terms of the sale was among the class eligible to purchase the trucks on a non-priority basis at the offered price if not sold to priority holders (R. 7). And contrary to the statement in the opinion below, the Federal agencies had a higher priority than veterans and not a lower priority (R. 7); a priority which was not exercised, resulting in the trucks then becoming available for purchase by veterans. Since the Government agencies did not want the trucks, the Government was in no way financially injured when petitioner bought them at the offered price on a lower claimed priority.

The present action is solely to vindicate the Government in its sovereign capacity and not to recover compensation for loss or injury suffered. Petitioner's defense of double jeopardy should be sustained.

Conclusion

For the foregoing reasons, this petition for a writ of rtiorari should be granted.

Respectfully submitted,

GUSTAV H. DONGUS,
MICHAEL L. FANSLER,
BERNARD STROYMAN,
Attorneys for Petitioner.

ENSLER, FAUVRE, DONGUS & CHAMBERS,
Of Counsel.

(Opinion Below).

In the

United States Court of Appeals

For the Seventh Circuit

No. 11139. OCTOBER TERM, 1954. JANUARY SESSION, 1955.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

REX TRAILER COMPANY, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

January 18, 1955.

Before DUFFY, *Chief Judge*, MAJOR and FINNEGAN, *Circuit Judges.*

DUFFY, *Chief Judge.* This action was brought by the United States government pursuant to § 26(b) of the Surplus Property Act.[1] The complaint contained five counts. Count 1 was as follows:

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[1] § 26(b)(1) of the Surplus Property Act of 1944, 50 U. S. C. A. appendix, § 1635(b), repealed and re-enacted as § 209(b) of the Federal Property and Administrative Services Act of 1949, 40 U. S. C. A. § 489(b).

"That the defendant during the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the state of Oklahoma, did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining 1 Ross Carrier Company Straddle Truck, model 90-7056, serial 1940 USA 563821."

Counts 2 to 5 inclusive are identical with Count 1 except as to the name of the person making the false statement and the description of the motor vehicle involved. Judgment was asked in the sum of $2,000 on each count. Both plaintiff and defendant moved for summary judgment and plaintiff's motion was granted. The District Court entered judgment in favor of plaintiff for the sum of $10,000.

Sec. 26(b) of the Surplus Property Act of 1944 grants to the United States civil remedies against "Every person who shall use or engage in * * * any fraudulent trick, scheme, or device, for the purpose of securing or obtaining * * * for any person any payment, property, or other benefits from the United States or any government agency in connection with the disposition of property under this Act * * * (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or * * * "

As a defense the defendant alleged that it had pleaded *nolo contendere* in a criminal action based upon the same events; that in said criminal action the indictment contained five counts that corresponded exactly with the five counts in the instant action; that on June 23, 1949, as a

result of its plea, a fine was imposed and defendant has paid an aggregate sum of $25,000; that plaintiff was not damaged and did not suffer any loss as it received the full offering price for the vehicles; that although the complaint was denominated "complaint for civil damages" this action is, in fact, one to recover penalties, and, therefore, is barred by the prohibition against double jeopardy contained in the Fifth Amendment to the United States Constitution.

Defendant was a dealer engaged in buying, selling and repairing farm machinery and mining machinery. Under the advertisement and offer of sale, it had a non-priority right to purchase the motor vehicles thus offered for sale if any such remained after those having priority had been given an opportunity to purchase. The "false statements" charged were the statements qualifying the persons named in each of the counts for a priority right to purchase. At the sales in question all vehicles advertised were sold to those having or claiming priorities.

The Fifth Amendment guarantees that no person shall "* * * be subject for the same offense to be twice put in jeopardy of life or limb." However, "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attemptin g a second time to punish criminally; for the same offense." *Helvering* v. *Mitchell*, 303 U. S. 391, 399.

As stated in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 548, "The application of the double jeopardy clause to particular cases has not been an easy task for the courts." In the same case, the court, page 549, quotes from *Helvering* v. *Mitchell, supra*, as follows: "The question for decision is thus whether * * * (the statute in ques-

tion) * * * imposes a criminal sanction. That question is one of statutory construction." In other words, we must here endeavor to ascertain the legislative intent.

The section in question was enacted shortly after the decision of the Supreme Court in *Marcus* v. *Hess, supra.* We may assume that the framers of § 26(b) were aware of that decision when they formulated § 26(b). It should be noted that the statute specifically describes subsection (b) as providing "civil remedies." The section contains subsections 1, 2 and 3. The latter two provide only for multiple damages and are, without question, compensatory in nature. It is very doubtful that Congress intended to have the first of the three subsections a penal section. In fact, the pertinent committee report (S. Rep. No. 1057, 78th Cong., 2d Sess. p. 14) states that the United States has "* * * the option of selecting among three different measures of damages, * * *" It is a reasonable construction that Congress intended all three subparagraphs of § 26(b) to be *in pari materia.* It is also of significance that § 26(d) expressly provides that the "civil remedies provided in (§ 26) shall be in addition to all other criminal penalties and civil remedies provided by law."

If § 26(b)(1) is of a penal nature the imposition of such penalty in addition to the sanctions provided by the criminal code, contravenes the prohibition against double jeopardy. Of course, statutes are to be construed, if possible, to avoid constitutional issues. *United States* v. *Congress of Industrial Organizations, et al.*, 335 U. S. 106, 120-121; *Guessefeldt* v. *McGrath, etc.*, 342 U. S. 309, 319.

Both sides discuss and the Government strongly relies upon *Marcus* v. *Hess, supra.* There the defendant had pleaded *nolo* to an indictment to defraud the United States,

and had paid the fine which was imposed. Thereafter, an action was brought under the False Claims Act (31 U.S.C. 231) which contains language quite similar to § 26(b). It provides that a person who commits certain frauds upon the United States "* * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained * * * together with the costs of the suit; * * *" And, as here, the defendant sought to defend the civil action on the ground that the statute prescribed a penalty and that the double jeopardy provision of the Fifth Amendment barred the proceeding under the False Claims Act.

The court held that the provision that the Government was to recover $2,000 and double damages for each fraud in violation of the statutes was remedial and not penal. The court (317 U. S. 549) said: "It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction * * * We cannot say that the remedy now before us requiring payment of a lump sum (of $2000) and double damages will do more than afford the government complete indemnity for the injuries done it."

This construction by the Supreme Court of the statutory provision for the payment of $2000 plus double damages is, indeed, persuasive as to the construction to be given to § 26(b)(1). Both provisions relate to frauds upon the Government. The False Claims Act pertains to frauds in connection with claims submitted to the government. Sec. 26(a)(1) deals with frauds in procuring property from the government. Indeed, the language "forfeit and pay" in the False Claims Act is stronger than the language

"pay" in §26(a)(1). As the Supreme Court held that "forfeit and pay" did not convert the $2000 payment plus double damages provision in that Act to a penalty it seems to follow that it would also construe the milder provision of "pay" in §26(a)(1) in the same manner.

We think the decision of *Helvering* v. *Mitchell*, *supra*, also indicates that §26(a)(1) does not provide a penalty. In that case there had been a prosecution of defendant for fraud under the tax laws. Defendant sought to defend against the government's claim for an additional 50% over the tax owed, on the ground that its recovery was barred by the prohibition against double jeopardy. The court, pointing out that the basic question was one of statutory construction, held that Congress intended the 50% provision as a civil and not a criminal sanction.

The Court of Appeals for the Fifth Circuit, in *United States* v. *Weaver, et al.*, 207 F. (2d) 796, held that §26(a)(1) was compensatory and not penal. That case involved the statute of limitations but whether the section was penal or compensatory was of prime importance in making the decision. The court said, pages 797-798: "This is not a criminal prosecution; it is not a civil action for a penalty; it is a civil action to recover an award of damages of a compensatory nature, payable to the United States for injuries to its property rights."[2]

In *Marcus* v. *Hess*, *supra*, page 548, the court pointed out the difference between civil remedial actions brought

[2] The Court of Appeals for the Sixth Circuit in *United States* v. *Witherspoon*, 211 F. 2d 858, held that §26(a)(1) was penal. It is interesting to note that the opinion made no mention of *Helvering* v. *Mitchell*, *supra*, or *Marcus* v. *Hess*, *supra*, nor why these decisions which we regard as persuasive, were regarded by that court as inapplicable. In our judgment the *Witherspoon* case was incorrectly decided.

primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice, and that only the latter subject the defendant to "jeopardy" within the constitutional meaning. The defendant argues that the government here has not suffered a financial loss and hence the *Marcus* case cannot be considered as authority against its contentions. Defendant argues that the decision in the court below was on a motion for summary judgment and, therefore, we must consider as true, defendant's allegation that the United States suffered no actual financial loss because the priority purchasers actually paid the offering price. Defendant insists that if this action involves more than making the United States whole for actual financial loss, it involves punitive elements.

We may concede that if veterans and all others having priority did not purchase the motor vehicles advertised, that defendant or other persons having no priority might have purchased same. However, such assumption ignores realities. The shortage of civilian motor vehicles in 1946-7 was very acute and was well known. Motor vehicles made up a large portion of the surplus property set aside for the exclusive use of veterans. The objectives of the Surplus Property Act in 1944 were to facilitate and regulate the orderly disposal of surplus property while giving effect to 20 enumerated purposes, among which were (f) the giving of an opportunity to returning veterans to establish themselves in business, agriculture or professional life and (h) the discouragement of disposal of surplus property to speculators.

We think the government was damaged in several respects and in a manner difficult to assess in monetary

damages. The government wished to sell its surplus motor vehicles to certified veterans in order to assist in their re-assimilation into civil life, and it was natural that the prices and conditions under which the government was willing to make these sales to veterans was more favorable than in the market place where gray and black market conditions were not uncommon. Defendant's fraud caused the government to deal with a class to which it did not desire to sell its surplus motor vehicles. Further, by its conduct if there were any vehicles left after supplying the wants of service men, various agencies of the Federal Government had next priority. If the supply was exhausted by frauds such as perpetrated by the defendant there was no other place for Government Agencies to purchase needed vehicles except on the open market.

It is well settled that in addition to actual losses the government is entitled to reimbursement of costs in connection with ferreting out and investigation of the frauds. *Helvering* v. *Mitchell, supra*, p. 401; *Stockwell* v. *United States*, 13 Wall. 531, 547.

We hold that § 26(a)(1) is not penal in nature and that the judgment entered in favor of the government must be and is

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeal for the Seventh Circuit.

APPENDIX A
(Judgment Below)

In the

United States Court of Appeals

For the Seventh Circuit

Chicago 10, Illinois

TUESDAY, JANUARY 18, 1955

Before

Hon. F. RYAN DUFFY, CHIEF JUDGE
Hon. J. EARL MAJOR, CIRCUIT JUDGE
Hon. PHILIP J. FINNEGAN, CIRCUIT JUDGE

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. REX TRAILER COMPANY, INC., *Defendant-Appellant.*	No. 11139 Appeal from the United States District Court for the SOUTHERN District of INDIANA INDIANAPOLIS Division

This cause came on to be heard on the transcript of the record from the United States District Court for the SOUTHERN DISTRICT of INDIANA, INDIANAPOLIS Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

AUG 31 1955
HAROLD B. WILLEY, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. 46

REX TRAILER COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinion Below

The District Court did not render an opinion. The opinion of the Circuit Court of Appeals (R. 17-23) is reported at 218 F. 2d 880.

Jurisdiction

The judgment of the Court of Appeals was entered on January 18, 1955 (R. 23). The petition for a writ of certiorari was filed on April 11, 1955, and granted on May 23, 1955 (R. 24). The jurisdiction of this Court is founded upon 28 U. S. C., sec. 1254(1).

Statute Involved

The statute involved is Section 26 of the Surplus Property Act of 1944 (58 Stat. 765, 780, 50 U. S. C. App. (1946 ed.), Section 1635),[1] the pertinent portion of which provided:

> (b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—
>
> (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or
>
> (2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

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[1] Section 26 of the Surplus Property Act of 1944 was repealed and reenacted as Section 209 of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377, 392, 40 U. S. C., Section 489).

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

* * * * *

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

Question Presented

Whether civil recovery by the United States from petitioner of the statutory sum of $2,000 for obtaining surplus property by fraud on each of the five counts of complaint based on Section 26(b)(1) of the Surplus Property Act of 1944 is barred by the prohibition against double jeopardy of the Fifth Amendment by reason of the prior criminal indictment against petitioner for the same offenses and its payment of the fines imposed, when on the admitted facts the United States suffered no pecuniary loss or damage.

Statement of the Case

Respondent's civil complaint against petitioner in five separate counts, filed in the District Court on August 9, 1950 (R. 1-3), was brought pursuant to the provisions of Section 26(b)(1) of the Surplus Property Act. Jurisdiction in the District Court was conferred by Section 26(c) of that Act. Count I of the complaint alleged that during the week of June 17, 1947, at Tinker Field, near Oklahoma City, Oklahoma, petitioner "did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration" for the purpose of obtaining a certain described motor truck (R. 2). Counts II

through V of the complaint are identical with Count I except as to the name of the person making the false statement and the description of the motor trucks involved. Judgment was asked in the sum of $2,000 on each count, or a total of $10,000 (R. 2-3). No damage to respondent was alleged in the complaint.

Petitioner in its amended answer pleaded that the action was to recover a statutory penalty and not "for the collection of any obligation or indebtedness owing to or the recoupment or recovery of damage suffered by the (United States)" (R. 6), and that petitioner had previously been indicted[2] in five counts with the identical offenses charged in the complaint, to which indictment it had pleaded *nolo contendere* and upon which a total fine of $25,000 was imposed on June 23, 1949, by the District Court of the United States for the Western District of Oklahoma and paid by petitioner (R. 6-7, 8-11).

Petitioner in its amended answer further alleged that the trucks in question "were advertised and offered for sale by the War Assets Administration at a fixed price and were sold first come first served to qualified purchasers;" that in the advertised offer for sale those granted priority of purchase were the "Housing Expediter and CPA Certificate Holders, Federal Agencies, Certified Veterans World War II, RFC for Small Business, States and

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[2] The indictment was brought under 18 U. S. C. (1940 ed.), Section 80, 35 Stat. 1095 (R. 8), which provides in part as follows:

"* * * * whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made, or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any manner, within the jurisdiction of any department or agency of the United States or of any corporation in which the United States is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Political Subdivisions and Certified Non-Profit Institutions" in that order of priority, and that if all available trucks were not purchased by those having priority, certain manufacturers and dealers of construction, mining and farm machinery were to have non-priority rights to purchase the trucks at the advertised price and that petitioner was such a dealer (R. 7). It was further alleged that the "false statements of a material fact in writing to the War Assets Administration" charged in the indictment were statements qualifying the persons named in each of the counts for a priority right to purchase, and that at the advertised sale all of the trucks were sold to those having or claiming priorities (R. 7).

In conclusion, it was alleged that respondent was not damaged and did not suffer any loss because of the sale of such trucks and received the full advertised offering price, and if the trucks had not been sold to the persons purchasing the same, they would have been sold at the same price to other priority or non-priority purchasers, and that the complaint seeks to recover a further penalty in addition to the fine and penalty adjudged and paid by petitioner, thereby placing it in double jeopardy contrary to the Fifth Amendment (R. 7-8).

Both parties moved for summary judgment on the pleadings (R. 3-5), and the District Court granted respondent's motion and overruled that of petitioner (R. 12). Judgment was thereupon entered that respondent recover from petitioner the sum of $10,000 and costs (R. 13). On appeal, the judgment was affirmed by the court below (R. 23).

Summary of Argument

The provision in Section 26(b)(1) of the Surplus Property Act for payment to the United States of $2,000, as distinguished from the double damages also recoverable, is a penalty to vindicate the public justice, *United States* v. *Witherspoon*, 211 F. 2d 858 (C. A. 6), and the instant action to collect such penalty is barred by the double jeopardy clause of the Fifth Amendment. To exact the arbitrary sum of $2,000 for each violation of the statute in this case where the Government admittedly had no financial loss stamps the action as being plainly punitive.

This Court's decisions in *Marcus* v. *Hess*, 317 U. S. 537 and *Helvering* v. *Mitchell*, 303 U. S. 391, relied upon by the court below, do not support the recovery of monetary civil sanctions given the Government by Congress as against the bar of double jeopardy where the Government has sustained no pecuniary loss. The fraudulent collusive bids in the *Hess* case necessarily damaged the Government, and the recovery there of $2,000 plus double damages under the False Claims Act did no more than make the Government whole for actual loss. Nor does the decision in the *Mitchell* case sustaining a 50% tax fraud penalty as a remedial sanction to reimburse the Government for expense of investigation and loss to the public revenue furnish basis for recovery in this case where the Government had no loss.

Any constitutional question concerning the statute involved may be avoided by construing the statute to permit recovery of the $2,000 penalty only when it will no more than compensate the Government for loss sustained.

The court below departed from the record in holding that the Government was damaged.

Argument

The Government's instant action to recover the sum of $2,000 under Section 26(b)(1) of the Surplus Property Act on each of five counts of complaint is, in fact, punitive and not remedial, and places petitioner twice in jeopardy contrary to the Fifth Amendment.

The Fifth Amendment to the Constitution of the United States guarantees that no person shall be "subject, for the same offence to be twice put in jeopardy of life or limb". Petitioner pleaded this constitutional prohibition against double jeopardy as a defense to the Government's action herein brought under Section 26(b)(1) of the Surplus Property Act of 1944 on the ground that petitioner previously had been indicted and paid criminal fines imposed on the same transactions set forth in the five counts of the Government's complaint (R. 6-7). The five counts of complaint and the corresponding counts of the previous indictment are identical in charging petitioner with causing a named individual "to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining" a certain described motor truck (R. 2-3; 9-10). The false statements charged qualified the individuals named with a priority right to purchase (R. 7).[3]

Petitioner in its answer in defense pleaded facts showing that the Government suffered no damage or loss from the sale of such trucks, having received the full advertised offering price (R. 8), and that the purpose of the action

[3] While not spelled out in the record, the priority claimed was that of certified veterans and the case was so argued in the Court of Appeals (Appellant's Brief, p. 9; Appellee's Brief, p. 26).

was not the collection of any obligation or indebtedness owing to the Government or the recovery of any damages suffered (R. 6). Those allegations were in effect admitted by the respondent in moving for summary judgment on the pleadings, just as the allegations of the complaint which failed to allege any damage to the respondent were in effect admitted by petitioner's motion for summary judgment.

The Court below held that the provision in Section 26 (b)(1) of the Surplus Property Act for the payment to the United States of "the sum of $2,000.00 for each such act" is compensatory in nature,[4] and hence petitioner's plea of double jeopardy was no bar to the maintenance of the action. Petitioner submits this is plainly wrong. The very language of this section of the statute reading

> "* * * shall pay to the United States the sum of $2,000 for each such act *and* double the amount of any *damage* the United States may have *sustained* * * *"[5]

clearly shows that Congress intended "the sum of $2,000 for each such act" as a penalty to vindicate public justice as distinguished from an action to make the Government whole for any damage or loss it "may have sustained * * * *." Suppose, for example, the Government had sustained a loss of only $25. Could it still plausibly be contended that an exaction of the sum of $2,000 would be compensatory; or suppose the Government had sustained no loss at all, as is admitted to be the case here, what basis would there be for a judgment in the arbitrary sum of $2,000 for each violation of the statute? Is not the imposi-

[4] The opinion below as certified and printed in the record in a number of instances refers to Section 26(a)(1) although it is clear that Section 26(b)(1), the statute involved, is the intended citation. This error is corrected in the reported opinion at 218 F. 2d 880.

[5] All italics in quotations are petitioner's unless otherwise stated.

tion of such a sanction in truth and in fact a criminal penalty no matter what other name it may be called, when by its very nature it is a penalty? See *Helwig* v. *United States*, 188 U. S. 605, 613.

The principle is stated in 23 Am. Jur., sec. 29, p. 625, as follows:

> "By damages is understood the indemnity, or composition in money, which the law gives to the injured party for the breach of a contract or a duty. In theory, such damages are precisely commensurate with the injury received, except in the case of exemplary damages or smart money, where some element of fraud, malice, gross negligence, or oppression enters into the controversy. A penalty, on the other hand, is the punishment, generally pecuniary, inflicted by a law for its violation. It has no reference to the actual loss sustained by him who sues for its recovery."

The Sixth Circuit Court of Appeals in considering this very question in *United States* v. *Witherspoon*, 211 F. 2d 858, held that Section 26(b)(1) was penal and therefore subject to the five-year limitations provision of 28 U. S. C., Sec. 2462. The Court stated at page 861:

> "The statute itself distinguishes between the sum of $2,000 required to be paid for each fraudulent act in violation of the statute, and the damages, which are also recoverable. * * *
>
> "The exaction of the arbitrary sum of $2,000 for each offense of obtaining, by fraud, surplus property, *without regard to its value*, is a provision for a penalty. *Its purpose is, obviously, to punish an offense against the public justice*, in addition to double the amount of all damages suffered by the government."[6]

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[6] As noted by the court in the *Witherspoon* opinion, the decision by the Fifth Circuit Court of Appeals in *United States* v. *Weaver*, 207 F. 2d 796 is to the contrary. That case also involved a limitations question.

The present action seeking to exact such penalty necessarily subjects petitioner to double jeopardy prohibited by the Fifth Amendment. See *Marcus* v. *Hess*, 317 U. S. 537, 548-549. The fact that the action is civil in form as provided by Section 26(d) of the Surplus Property Act does not preclude the application of the double jeopardy clause if, in fact, the remedy is penal. See *United States* v. *Chouteau*, 102 U. S. 603, 611; *Coffey* v. *United States*, 116 U. S. 436, 445; *United States* v. *LaFrance*, 282 U. S. 568, 574.

The court below held that *Marcus* v. *Hess*, 317 U. S. 537, supports the decision that the sum of $2,000 in Section 26 (b)(1) is compensatory in nature. On the contrary, the opinion of the Court in that case makes it crystal clear that if on the facts involved in a *particular* case the exaction, no matter what name it might be called, is a second punishment for the same offense it would be in contravention of the double jeopardy clause of the Fifth Amendment. Certainly *Marcus* v. *Hess* is not authority that the Government may exact a penalty under the guise of damages where, as here, it is admitted that the Government sustained no damage or suffered no loss. There an action was brought under the False Claims Act (31 U. S. C., Section 231) providing that a person who commits certain frauds upon the United States "shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained * * * together with the costs of suit; * * *". The defendants were charged with defrauding the Government out of money through the use of fraudulent collusive bids on certain building projects. The defendants previously had been indicted for the same transactions and fined and, as here, pleaded double jeopardy. This Court in rejecting such defense held that the

statutory provision for $2,000 plus double damages was remedial and not penal, stating (317 U. S. at 548-549):

> "The application of the double jeopardy clause to *particular cases* has not been an easy task for the courts. The subject has recently been thoroughly explored in *Helvering* v. *Mitchell*, 303 U. S. 391, in which the Court analyzed the cases now pressed upon us and emphasized the line between civil, *remedial actions brought primarily to protect the government from financial loss* and actions intended to authorize criminal punishment to vindicate public justice. Only the latter subject the defendant to 'jeopardy' within the constitutional meaning. *Ibid.*, 397, 398. We may start, therefore, with the language of the Mitchell case: 'Congress may impose both a criminal and civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether * * * (the statute in question) * * * imposes a criminal sanction. That question is one of statutory construction.' *Ibid.*, 399. Is the action now before us, consisting of double damages and the $2,000 forfeiture, *criminal* or *remedial?*
>
> "It is enough for present purposes if we conclude that the instant proceedings are *remedial* and impose a civil sanction. The statutes on which this suit rests make elaborate provision both for a criminal punishment and a civil remedy. * * * We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete *indemnity* for the injuries done it."

In determining that the statute was not designed to impose criminal punishment but to give the United States reparation in damages for injuries sustained from frauds

in the spending of the Government's money, the Court concluded (at pp. 551-552):

> "We think the chief purpose of the statutes here was to provide for *restitution* to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. This conclusion is consistent with a statement made immediately before final passage of the bill. A Senator discussing these sections said: 'The government ought to have the privilege of coming upon him (a fraudulent contractor) or his estate and his heirs and recovering the money of which it was defrauded.' The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress."

The collusive bids in the *Hess* case by their very nature resulted in damage to the Government in increased costs, and the action there did no more than make the Government whole for actual loss. In the case at bar the Government admits that the United States suffered no actual loss, and consequently, the action is not to make it whole and to recover a loss.

In *Helvering* v. *Mitchell*, 303 U. S. 391, referred to by the Court in its opinion in *Marcus* v. *Hess*, *supra*, the defendant had been indicted for fraudulent evasion of income taxes and was acquitted. The Government then brought action to recover the omitted taxes plus an additional 50% based on the taxpayer's fraud. In holding that the recovery of the additional tax was not barred by the double jeopardy clause of the Fifth Amendment, the Court stated (303 U. S. at 401):

> "The remedial character of sanctions imposing additions to a tax has been made clear by this Court in

> passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."

The loss in the *Mitchell* case was to the public revenue and the expense that of ferreting out taxes owing which were fraudulently evaded. The decision in that case goes no further than to hold that where the Government has suffered a pecuniary loss, the recovery may include a sufficient sum to cover the Government's expense in recovering the loss so that it will be made entirely whole. Neither *Mitchell* nor *Stockwell* v. *United States*, 13 Wall. 531, cited in the opinion below (R. 22), is authority that respondent may recover in this civil action the flat rate of $2,000 per offense to reimburse the Government for investigative expense in the criminal proceedings.

The opinion below notes that statutes are to be construed to avoid constitutional issues (R. 19). Unconstitutionality is avoided by construing the statute to permit recovery of the $2,000 penalty to those cases where the Government has been damaged. That Congress may have intended the statute as a compensatory remedy cannot be dispositive of a particular case, such as this, where to enforce the remedy is not to compensate but to penalize. And if the statute be construed to impose payment of the arbitrary sum of $2,000 irrespective of loss, then such exaction is punishment for violation of the statute and the double jeopardy clause bars this action.

To show that the Government was damaged here, the court below, near the close of its opinion, stated the following (R. 22):

"We may concede that if veterans and all others having priority did not purchase the motor vehicles advertised, that defendant or other persons having no priority might have purchased same. However, such assumption ignores realities. The shortage of civilian motor vehicles in 1946-7 was very acute and was well known. Motor vehicles made up a large portion of the surplus property set aside for the exclusive use of veterans. * * *

"We think the government was damaged in several respects and *in a manner difficult to assess in monetary damages.* The government wished to sell its surplus motor vehicles to certified veterans in order to assist in their re-assimilation into civil life, and it was natural that the prices and conditions under which the government was willing to make these sales to veterans was more favorable than in the market place where gray and black market conditions were not uncommon. Defendant's fraud caused the government to deal with a class to which it did not desire to sell its surplus motor vehicles. Further, by its conduct if there were any vehicles left after supplying the wants of service men, various agencies of the Federal Government had next priority. If the supply was exhausted by frauds such as perpetrated by the defendant there was no other place for Government Agencies to purchase needed vehicles except on the open market."

None of the foregoing is supported by *any facts* in the record in this case. Even if it be assumed that the claimed shortage of motor vehicles in 1946-1947 is so well known that it is a matter subject to judicial notice, there is nothing in the record to support the assertion that the prices and conditions upon which the Government was willing to make the sales involved *in this case* "was more favorable than in the market place." There is no evidence in the record

that the motor vehicles were offered at any bargain prices, or that the advertised price paid by petitioner was less than the current market price.

Moreover, petitioner under the terms of the sale was among the class eligible to purchase the motor trucks on a non-priority basis at the offered price if not sold to the listed priority holders (R. 7). And contrary to the statement in the opinion below, the Federal agencies had a higher priority than veterans and not a lower priority (R. 7), a priority which was not exercised, so that the trucks then became available for purchase by veterans. Since the Federal agencies did not want the trucks, the Government was in no way financially injured when petitioner bought them at the offered price on a lower claimed priority.

The instant action is solely to vindicate the Government again in its sovereign capacity as preserver of the peace and not to recover compensation for loss or damage suffered. Petitioner's defense of double jeopardy should be sustained.

CONCLUSION

For the foregoing reasons, the judgment entered below should be reversed.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Statement

Respondent, in its brief, under the heading "The statutory background," points out that property exclusively set aside for veterans by the Administrator as authorized

during the week of June 17, 1947, at Tinker Field, near Oklahoma City, Oklahoma, petitioner "did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining 1 Ross Carrier Company Straddle Truck, model 90-7056, Serial 1940 USA 563821" (R. 2). The complaint contained four additional counts, numbered II through V, which are identical with Count I except as to the name of the person whom petitioner had caused to make the false statement and the description of the vehicle involved (R. 2-3). On the basis of the allegations contained in these five counts, the complaint prayed for judgment in the amount of $2,000 for each of the five frauds perpetrated by petitioner upon the War Assets Administration, as provided in Section 26(b)(1) of the Surplus Property Act (*supra*, p. 2), a total of $10,000 with costs (R. 3).

By its amended answer, petitioner in effect admitted the truth of the allegations in the Government's complaint, but sought to defend on the ground that the Government's action was one for a "statutory penalty" and not "for the collection of any obligation or indebtedness owing to or the recompment or recovery of damage suffered by the [United States]" (R. 6). The answer alleged that petitioner had previously been indicted for the "identical offenses charged in the * * * complaint herein," and that, having pleaded *nolo contendere*,

by the 1946 amendment to the Surplus Property Act (60 Stat. 168) had a "superpriority surpassing even that of the United States" (Resp. Br. 6). However, no such top priority to veterans is involved in this case.[1] The admitted facts are that the Housing Expediter with CPA certificate holders, and Federal agencies, each had a higher priority than certified veterans of World War II to purchase the motor trucks acquired by petitioner under the claimed veterans' priority (R. 7). Where surplus property was not exclusively set aside for veterans by the Administrator, which is the case here, the general first priority to Federal agencies continued to outrank the veterans' preference. See S. Rep. No. 1142, 79th Cong., 2d Sess. pp. 1-2; Resp. Br. 35-36.

The statement in respondent's brief (at p. 7) which implies that the surplus property in this case was offered to veterans "at an attractive price and on favorable credit terms" likewise has no support in the record. Respondent places particular emphasis on section 8302.11 of the Regulations, 32 C.F.R. (1946 Supp.) providing that the "fair value" at which property shall be acquired by priority claimants "shall not be greater than the lowest price which is offered to any trade level at the time of acquisition * * *" (Resp. Br. 7, fn. 6). The lowest price offered could well be more, and not less, than the prevailing market price, and there is nothing in the record to show that the used motor trucks petitioner purchased could have been sold by the War Assets Administration at any higher price than the fixed sale price. In any event, any speculation as to possible loss to the Government on this score, or in any other aspect, is wholly outside the record, since on the admitted facts respondent suffered no financial loss (R. 8).

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[1] In *United States* v. *Weaver*, 207 F. 2d 796 (C. A. 5), the motor vehicles were exclusively set aside for veterans.

Argument

Respondent contends that under this Court's decisions in *Marcus* v. *Hess*, 317 U. S. 537 and *Helvering* v. *Mitchell*, 303 U. S. 391, that once it is determined that the statutory remedy provides restitution for damages to the Government, then the remedy inexorably applies to all cases irrespective of actual damage in a particular case and the double jeopardy clause of the Fifth Amendment has no application (Resp. Br. 11-12, 28). If this be true, which petitioner denies, then Congress may impose such penalties for injuries to the Government as it may see fit under the guise of compensation and collect the penalties in full even though the Government has no loss and in addition punish criminally by fine and imprisonment. To impose liability for violation of statute where there is no loss is not reparation for injury but punishment for wrongdoing within the proscription of the double jeopardy provision.

Both the *Hess* and *Mitchell* cases clearly hold that recovery can only be had if the Government has sustained a loss. In the *Mitchell* case, if there had been no taxes found owing, or a loss to the public fisc, there would have been nothing on which to base the additional 50% fraud penalty. And in the *Hess* case, although as to several of the contracts involved the Government failed to prove an amount of damages, damages in some amount were inferrable from fraudulent collusive bidding, the very purpose of which was to gouge the Government into paying more than competitive bidding would have required. In such case it might be difficult to prove the exact amount of the Government's loss; whereas here, the facts show that there was no loss in any amount and this is admitted by respondent.

Contrary to respondent's contention with respect to the holding in the *Hess* case, Mr. Justice Frankfurter in his concurring opinion understood the Court's opinion in that case to require loss to the Government. As stated by him (317 U. S. at 553):

> "The Fifth Amendment guarantees that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' The respondents invoke this provision as a bar to this suit; and as I understand its holding, the Court rejects this plea of double jeopardy by treating the present action as one merely to make the United States whole for actual loss, and therefore without any punitive elements."

Respondent asserts that damages from frauds committed in connection with the disposal of surplus property including war plants, ships, strategic minerals, airports, aircraft, harbor and port terminals "would be at least as extensive and difficult of exact proof as those resulting from the frauds dealt with in the False Claims Act," and the provision for $2,000 plus double damages "constitutes a reasonable measure, in general, of the foreseeable damage to the Government" (Resp. Br. 31-32). What difficulties may exist in proof of damage resulting from frauds in the sale of property are not shown, but the statutory formula in adding the flat sum of $2,000 is unreasonable and unjust when it is considered that surplus property also included office equipment such as desks, chairs and filing cabinets[2] and items selling for as little as ten cents.[3] The exaction

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[2] Exhibit A following 32 C. F. R. (1946 Supp.), Sec. 8302.14, containing a schedule of property to be set aside for veterans.

[3] Sales listing of the St. Louis Regional Office, War Assets Administration, "Surplus Government Property—Construction, Mining and Farm Machinery—Fixed Price Sale from March 22, 1947 to April 23, 1947," p. 67, offering 178 "Cat Heads, Universal No. 2. Unused, good (0015479-1-2)" at ten cents each.

had paid fines in the aggregate amount of $25,000 (R. 6-7, 8-11). The answer further averred that petitioner's frauds has not caused the Government any damage or loss since it received the full advertised offering price for the trucks and, had the trucks not been sold to petitioner, they would have been sold at the same price to other priority or non-priority purchasers.

Thereafter, both parties moved for summary judgment. The Government's motion was on the ground that there was no genuine issue of fact and further that, since the defenses set out in petitioner's answers were insufficient, the Government was entitled to judgment as a matter of law (R. 3-4). Petitioner's motion was based on the claim that the Government's suit, being for a statutory penalty, was barred by the Fifth Amendment's prohibition against double jeopardy (R. 4-5). The district court overruled petitioner's motion for summary judgment and granted the Government's motion, holding that the double jeopardy provision of the Fifth Amendment was not applicable to this civil action for damages. Accordingly, the district court entered judgment for the Government for $10,000, $2,000 for each of the five frauds practiced by petitioner (R. 12-13). On appeal, the court below affirmed, holding that Section 26(b)(1) was remedial and not penal, and therefore that the action was not barred by the Fifth Amendment's prohibition against double jeopardy (Pet. App. pp. 11-18).

of the arbitrary sum of $2,000 for each fraud without regard to the value of surplus property, and without regard as to whether there was any actual injury or loss, and in the face of the admission by the pleadings that there was no loss, can only be punitive. Cf., *United States* v. *Witherspoon*, 211 F. 2d 858, 861 (C. A. 6); *United States* v. *Weaver*, 207 F. 2d 796, 798 (C. A. 5).

Respondent states that "the statutory provision for the Government's recovery is comparable to a contractual provision for liquidated damages" (Resp. Br. 29), and cites *Priebe & Sons* v. *United States*, 332 U. S. 407, to the effect that such contractual provisions are enforced when fair and reasonable. It is pertinent to note that the Government in that case made an analagous argument to that advanced here in contending that the liquidated damage provision should be enforced "even though no damages were apparent in a particular case" (332 U. S. at 411). In holding that the liquidated damage provision was unenforceable as imposing a penalty, the Court pointed out (at p. 413) that under the circumstances of that case such provision "could not possibly be a reasonable forecast of just compensation for the damage caused by breach of contract" and that "an exaction of punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust."

The exaction of the stipulated statutory sum of $2,000 in this case where the Government also had no damage is doubly oppressive. To be sure, this $2,000 statutory penalty could be collected in a civil suit in the absence of previous criminal punishment. But when, as here, the Constitutional protection against twice being punished for the same offense is invoked, the penalty cannot be enforced unless there is damage.

By bringing in matters extraneous to the record concerning a supposed shortage of motor vehicles in 1947 and that surplus vehicles were allegedly offered to veterans at less than market prices (cf., the Statement, supra, p. 2), respondent urges that the Government was in fact damaged (Resp. Br. 33-35). If the case had been tried, evidence with respect to such market condition, if it existed, might have been received as bearing on the issue of damages. But there was no trial and the facts are fixed and admitted by the pleadings and the pleadings alone. It is upon those facts the case must be decided, and those facts are that the Government sustained no loss.

The further assertion that petitioner's procurement of the used trucks may have deprived some government agency from obtaining vehicles which it needed, and thus compelled it to purchase on the market at a higher price (Resp. Br. 35-36), is without support in the record. If any Federal agency needed the trucks, it could have exercised its higher priority to the exclusion of petitioner.[4] Here again, the Government had no loss.

The suggestion that the $2,000 is recoverable to reimburse the Government for expense in investigating frauds which caused no financial loss is an attempt by respondent to pull itself up by its own bootstraps.

Respectfully submitted.

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[4] For the order of priority, see the Statement, supra, p. 2, and Petitioner's Brief, pp. 4-5.

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No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1954

REX TRAILER COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
WARREN E. BURGER,
Assistant Attorney General,
MELVIN RICHTER,
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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 715

REX TRAILER COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The order of the District Court granting the Government's motion for summary judgment (R. 12-13) is not reported. The opinion of the Court of Appeals (Pet. App. pp. 11-18) is reported at 218 F. 2d 880.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 1955 (Pet. App. p. 19). The

petition for a writ of certiorari was filed on April 11, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

STATUTE INVOLVED

Section 26 of the Surplus Property Act of 1944 (58 Stat. 765, 780, 50 U. S. C. App. (1946 ed.) 1635) provided in pertinent part:[1]

> (b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—
>
> (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or
>
> (2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

[1] Section 26 of the Surplus Property Act, having been replaced by the virtually identical Section 209 of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377, 392, 40 U. S. C. 489), was repealed by Section 502(a) of the latter Act (63 Stat. 399).

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

* * * * *

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

STATEMENT

This is an action brought by the United States pursuant to Section 26(b) of the Surplus Property Act of 1944 (*supra*, pp. 2-3) which grants to the United States civil remedies against "[e]very person who shall use or engage in * * * any fraudulent trick, scheme, or device, for the purpose of securing or obtaining * * * for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act * * *." Section 26(b) authorizes the United States to recover (1) $2,000 for each such fraudulent act plus twice the amount of any damages sustained plus the cost of suit; or (2) twice the consideration which the purchaser agreed to pay; or (3) the property while keeping the full consideration paid by the fraudulent purchaser. See S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14.

The Government's complaint, which was filed on August 9, 1950 (R. 1-3), alleged in Count I that

DISCUSSION

1. Contrary to petitioner's assertion (Pet. pp. 6-8), this Court's decisions in *Helvering* v. *Mitchell*, 303 U. S. 391, and *Marcus* v. *Hess*, 317 U. S. 537, fully support, if they do not require, the ruling in this case that the $2,000 plus double damage provision of Section 26(b)(1) of the Surplus Property Act is compensatory, not penal, so that the double jeopardy prohibition of the Fifth Amendment is inapplicable.

(a) *Marcus* v. *Hess*, as here, involved a situation in which the defendant had pleaded *nolo contendere* to an indictment for conspiracy to defraud the United States and had paid the fines imposed. After this criminal proceeding, an action was brought under the provision of the False Claims Act (Rev. Stat. 5438, 3490, 31 U. S. C. 231) which declares, in language substantially identical to that of the Surplus Property Act, that a person who commits certain frauds upon the United States

> shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained * * * together with the costs of suit * * *.

There, as here, the defendant sought to defeat the civil action on the ground that the statute under which it was brought prescribed a penalty and, accordingly, the prior criminal proceeding, coupled with the double jeopardy provision of the Fifth Amendment, precluded the judgment for $2,000.

plus double damages for each fraudulent act, sought by the Government in the civil suit.

This Court, however, expressly rejected these contentions, ruling that the provision of the False Claims Act that the Government was to recover $2,000 and double damages for each fraud was remedial and not penal. Pointing out that the double jeopardy provision applies only to "actions intended to authorize criminal punishment to vindicate public justice" and not to "civil, remedial actions brought to protect the government from financial loss" (317 U. S. at 548-549), the Court quoted from its earlier decision in *Helvering* v. *Mitchell*, 303 U. S. 391, 399, to the effect that (317 U. S. at 549):

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether * * * [the statute in question] * * * imposes a criminal sanction. That question is one of statutory construction.

And with reference to the statute before it the Court held (*ibid*):

> It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction. * * * We cannot say that the remedy now before us requiring payment of a lump sum [of $2,000] and double

> damages will do more than afford the government complete indemnity for the injuries done it.

Further commenting that the $2,000 plus-double damage provision of the False Claims Act was enacted by Congress, not as preserver of peace or to vindicate public justice, but in order to protect the property rights of the United States, rights which the Government has just like any other person (at 549-550), the Court concluded (at pp. 551-552):

> It is true that "Punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned," but this is not enough to label it as a criminal statute. *Brady* v. *Daly*, 175 U. S. 145, 157. We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. * * * The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress.[2]

As already indicated, *Marcus* v. *Hess*, refers to the Court's earlier decision in *Helvering* v.

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[2] See, also, *United States* v. *Grannis*, 172 F. 2d 507, 511 (C.A. 4), certiorari denied, 338 U.S. 860, where the Court of Appeals for the Fourth Circuit held that "It is clearly established that the defense of double jeopardy is not applicable to civil actions under the federal false claims statute."

Mitchell, 303 U. S. 391. In that case, there had also been criminal proceedings against the defendant for fraud under the tax laws, and the defendant sought to defeat the Government's later claim for an additional 50% over the tax on the ground that, as a penalty, its recovery was barred by the prohibition against double jeopardy. In rejecting this claim, the Court observed (303 U. S. at 401):

> The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud. * * *

And the Court went on to point out that the basic question is one of statutory construction and that the evidence demonstrated that Congress intended a civil, not a criminal, sanction (*id.*, at 401-402):

> In §§ 276 and 293 it is provided that collection of the 50 per centum addition, like that of the primary tax itself, may be made "by distraint" as well as "by a proceeding in court." If the section provided a criminal sanction, the provision for collection by distraint would make it unconstitutional. Compare *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386. See also *United States* v. *Chouteau*, 102 U. S. 603, 611;

Boyd v. *United States*, 116 U. S. 616; *Lees* v. *United States*, 150 U. S. 476; *United States* v. *La Franca*, 282 U. S. 568. That Congress provided a distinctly civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil, not a criminal, sanction. Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply. * * *

(b) The construction accorded by this Court to the $2,000 plus double damage provision in *Marcus* v. *Hess, supra*, is fully applicable to the virtually identical provision of Section 26(b)(1) of the Surplus Property Act.[3] This is particularly so since both provisions relate to frauds upon the Government, the False Claims Act pertaining to frauds in connection with claims submitted *to* the Goverment and Section 26(b)(1) dealing with frauds in procuring property *from* the Government. Indeed, if the stronger "forfeit and pay" language of the False Claims Act was not deemed by this Court to convert the $2,000 plus double damages provision of that Act into a penalty, it would seem that the weaker term "pay" used in Section

[3] The only difference between the False Claims Act and the Surplus Property Act is that the former provides that the defrauder shall "forfeit and pay" $2,000 plus double damages and the latter provides only that he shall "pay."

26(b)(1) would *a fortiori* militate against the construction of that provision pressed by petitioner.

Moreover, in view of the express recognition in both *Marcus* v. *Hess* and *Helvering* v. *Mitchell* that the problem of the nature of the remedy is basically one of statutory construction and Congressional intent, it is significant that *Marcus* v. *Hess* was decided in January 1943, shortly before the enactment of the Surplus Property Act of 1944. It is fair to assume that the draftsmen of Section 26(b)(1) used the damage formula of the False Claims Act, construed in *Marcus* v. *Hess*, as their model for Section 26(b)(1), and in enacting that provision Congress may be assumed to have adopted this Court's construction. This is also evidenced by the express language of Section 26(d) of the Surplus Property Act, *supra*, p. 3, describing subsection (b) as providing "civil remedies". Moreover, since Sections 26(b)(2) and (3) (providing only for multiple damages) are plainly of a compensatory nature,[4] it would be incongruous to conclude that Congress intended to include in the same section a penal sanction and two compensatory remedies. That Congress had no such purpose is clear from the pertinent committee report (S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14), which

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[4] It has been generally recognized that statutes which provide for multiple lump sum or minimum damages, or a combination of these, are compensatory, not punitive. See, *e.g.*, *Stockwell* v. *United States*, 13 Wall. 531, 547, 551; *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, 583-4; *Atchison, Topeka & Santa Fe Ry.* v. *Nichols*, 264 U.S. 348, 351; *Woolworth Co.* v. *Contemporary Arts*, 344 U.S. 228; *Brady* v. *Daly*, 175 U.S. 148.

government was willing to make these sales to veterans was more favorable than in the market place where gray and black market conditions were not uncommon. Defendant's fraud caused the government to deal with a class to which it did not desire to sell its surplus motor vehicles. Further, by its conduct if there were any vehicles left after supplying the wants of service men, various agencies of the Federal Government had next priority. If the supply was exhausted by frauds such as perpetrated by the defendant there was no other place for Government Agencies to purchase needed vehicles except on the open market.

2. Petitioner correctly asserts a conflict between the holding below and *United States* v. *Witherspoon*, 211 F. 2d 838 (C. A. 6) (Pet. pp. 5-6). In *Witherspoon* the Court of Appeals for the Sixth Circuit rejected the Government's contention that the $2,000 plus double damage provision of Section 26(b)(1) was remedial only, holding instead that that section provided for a penalty, and hence that action thereunder is subject to the statute of limitations for suits for penalties contained in 28 U. S. C. 2462. This holding shows that a conflict of decision does in fact exist.[5] Consequently,

[5] Although the holding below conflicts with *Witherspoon*, it is in accord with *United States* v. *Weaver*, 207 F. 2d 796 (C.A. 5) where in a factual situation on all fours with *Witherspoon* the Court of Appeals for the Fifth Circuit held that Section 26(b)(1) is not penal and hence not subject to 28 U.S.C. 2462.

while we believe that the decision here is clearly correct and virtually required by *Marcus* v. *Hess*, and that *Witherspoon* is wrong,[6] we do not oppose the granting of certiorari, particularly since there are a large number of cases—many already pending in the courts and others to be filed—in which the determination of the nature of the sanction provided by Section 26(b)(1) may be dispositive.

Respectfully submitted,

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WARREN E. BURGER,
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MELVIN RICHTER,
Attorney.

MAY, 1955.

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[6] As the court below pointed out in regard to *Witherspoon*, "It is interesting to note that the opinion made no mention of *Helvering* v. *Mitchell*, *supra*, or *Marcus* v. *Hess*, *supra*, nor why these decisions which we regard as persuasive, were regarded by that court as inapplicable." (Pet. App., p. 16, fn. 2). These cases were urged upon the Sixth Circuit by the Government.

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states that Section 26(b) gives to the United States "the option of selecting among three different measures of damages," thus manifesting the Congressional view that all three subparagraphs of Section 26(b) were to be *in pari materia* and, of particular significance here, that subparagraph (1), as well as the other subparagraphs, was intended as compensatory in nature.

(c) Nor is there any substance to petitioner's attempted distinction of *Marcus* v. *Hess* and *Helvering* v. *Mitchell* on the ground that, in those cases, the frauds resulted in actual damages to the Government whereas here the answer denied any such damages. (Pet. p. 7.) First, in *Marcus* v. *Hess* there was no actual damage to the United States in regard to eight of the contracts and this Court, as well as the District Court, rejected the contention that the absence of actual damage precluded recovery of the $2,000 lump sum provided by the False Claims Act. 317 U. S. at 552-553; 41 Supp. 197, 218 (W. D. Pa.); see *United States* v. *Rohleder*, 157 F. 2d 126, 129 (C. A. 3). Similarly, in *Helvering* v. *Mitchell*, the Government suffered no actual damage as a result of the taxpayer's fraud, yet the Court held that the 50% additional assessment was not a penalty because it was intended to reimburse the Government for the costs incurred by it in investigating the taxpayer's frauds. See 303 U. S. at 398-405.

Moreover, as already shown, *supra*, pp. 6-10, the determination whether the provision is remedial or penal turns upon the legislative purpose, *i.e.*,

whether Congress intended to impose a civil remedy or a criminal sanction, and not upon whether the fraud resulted in specific, provable, damage to the Government. In any case, as the court below noted (Pet. App. pp. 17-18):

> We may concede that if veterans and all others having priority did not purchase the motor vehicles advertised, that defendant or other persons having no priority might have purchased same. However, such assumption ignores realities. The shortage of civilian motor vehicles in 1946-7 was very acute and was well known. Motor vehicles made up a large portion of the surplus property set aside for the exclusive use of veterans. The objectives of the Surplus Property Act in 1944 were to facilitate and regulate the orderly disposal of surplus property while giving effect to 20 enumerated purposes, among which were (f) the giving of an opportunity to returning veterans to establish themselves in business, agriculture or professional life and (h) the discouragement of disposal of surplus property to speculators.
>
> We think the government was damaged in several respects and in a manner difficult to assess in monetary damages. The government wished to sell its surplus motor vehicles to certified veterans in order to assist in their reassimilation into civil life, and it was natural that the prices and conditions under which the

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BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 46

REX TRAILER COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the District Court granting the Government's motion for summary judgment (R. 12-13) is not reported. The opinion of the Court of Appeals (R. 17-23) is reported at 218 F. 2d 880.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 1955 (R. 23). The petition for a writ of certiorari was filed on April 11, 1955 and granted on May 23, 1955 (R. 24). 349

U. S. 937. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the provision in Section 26(b)(1) of the Surplus Property Act for recovery by the Government of $2,000 plus double the amount of any damage for frauds perpetrated upon it is compensatory rather than penal so that suit thereunder does not subject petitioner to double jeopardy proscribed by the Fifth Amendment, although in a prior criminal proceeding based on the same frauds petitioner pleaded *nolo contendere* and paid the fines imposed.

STATUTE INVOLVED

Section 26 of the Surplus Property Act of 1944 (58 Stat. 765, 780, 50 U. S. C. App. (1946 ed.) 1635) provided in pertinent part: [1]

> (b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—

[1] Section 26 of the Surplus Property Act, having been replaced by the virtually identical Section 209 of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377, 392, 40 U.S.C. 489), was repealed by Section 502(a) of the latter Act (63 Stat. 399).

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

* * * * *

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

STATEMENT

This is an action brought by the United States pursuant to Section 26(b)(1) of the Surplus Property Act of 1944 (*supra*, pp. 2-3) to recover $2,000 for each of five frauds perpetrated by petitioner upon the United States in connection with the Government's disposal of surplus property. The District Court granted summary judgment for the Government and denied it to petitioner, thereby rejecting petitioner's claim that, since petitioner

had pleaded *nolo contendere* and paid fines in a criminal action based on the same events, this civil action for damages was barred by the Fifth Amendment's prohibition against double jeopardy (R. 12-13). The court below affirmed (R. 17-23). The pertinent facts may be summarized as follows:

The statutory background. Section 26(b) of the Surplus Property Act of 1944 (*supra*, pp. 2-3), pursuant to which this action was brought, grants to the United States civil remedies against "every person who shall use or engage in * * * any fraudulent trick, scheme, or device, for the purpose of securing or obtaining * * * for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act * * *." Section 26(b) authorizes the United States to recover (1) $2,000 for each such fraudulent act plus twice the amount of any damages sustained plus the cost of suit; or (2) twice the consideration which the purchaser agreed to pay; or (3) the property, while keeping the full consideration paid by the fraudulent purchaser. See S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14.

The objectives of the Surplus Property Act of 1944 (58 Stat. 765) were to facilitate and regulate the orderly disposal of surplus property (Section 2, 58 Stat. 766, 50 U.S.C. App. (1946 ed.) 1611) while giving effect to twenty enumerated purposes, including (d) the discouragement of monopolistic practices and the preservation of small business,

(f) the giving of an opportunity to returning veterans to establish themselves in business, agriculture, or professional life, (h) the discouragement of disposal of surplus property to speculators, (q) the prevention of the making of unusual and excessive profits, and (t) the securing to the United States as nearly as possible the fair value of property disposed of under the Act, except when otherwise provided.

In order to carry out the statutory purpose of assisting veterans, Section 16 (58 Stat. 773, 50 U. S. C. App. (1940 ed., Supp. V) 1625), as originally enacted, authorized the Surplus Property Board[2] to prescribe regulations "to effectuate the objectives of this Act to aid veterans to establish and maintain their own small business, professional, or agricultural enterprises, by affording veterans suitable preferences * * *." The actual operation

[2] The Surplus Property Board was abolished and its functions were transferred to the Surplus Property Administration and the Surplus Property Administrator, respectively, by the Act of September 18, 1945, 59 Stat. 533, 50 U.S.C. App. (1946 ed.) 1614a, 1614b. Executive Order No. 9689 of January 31, 1946 (11 F.R. 1265), transferred these functions first to the War Assets Corporation and, effective March 25, 1946, to the War Assets Administration and the War Assets Administrator. Reorganization Plan No. 1 of 1947, Sec. 501, 61 Stat. 952, transferred these functions back to the Surplus Property Administration and the Surplus Property Administrator, changing their names, however, to the War Assets Administration and War Assets Administrator, respectively. The Federal Property and Administrative Services Act of 1949, Sec. 105 (63 Stat. 381; 5 U.S.C. 630c) finally placed these functions in the hands of the General Services Administration and the Administrator of General Services, respectively.

of the statute, however, disclosed that it was of little value to veterans since federal and state agencies enjoying higher priorities under Sections 12 and 13 (58 Stat. 770, 50 U. S. C. App. (1940 ed., Supp. V) 1621, 1622) absorbed virtually all the surplus property in which veterans were interested.[3] Congress, consequently, amended the Surplus Property Act in 1946 (60 Stat. 168) by giving veterans a priority surpassed only by that of the Federal Government and in addition authorizing the Administrator[4] to—

> * * * set aside or otherwise * * * [make] available quantities and types of any surplus property, except real property, which he determines to be appropriate for *exclusive disposal* to veterans for their own personal use, and to enable them to establish and maintain their *own* small business, professional, or agricultural enterprises. [Emphasis added.]

Property thus set aside for veterans enjoyed a superpriority surpassing even that of the United States.[5]

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[3] Cf. S. Rep. No. 1142, 79th Cong., 2d Sess., and H. Rep. No. 1954, 79th Cong., 2d Sess.; 92 Cong. Rec. 4001.

[4] See fn. 2, p. 5, *supra*.

[5] S. Rep. No. 1142, 79th Cong., 2d Sess., p. 3, listed the priorities as follows:

1. Property set aside for veterans.
2. Federal Government.
3. Veterans generally.
4. Small business.
5. States and their political subdivisions and instrumentalities.

This preference was of great value to veterans, not only because it entitled them to acquire the property at an attractive price and on favorable credit terms,[6] but also because it enabled them to acquire those items which were in short supply. In 1946, the United States was still in the midst of reconversion, and surplus property sales were the only source from which many goods could be acquired.[7] As had been intended by Congress,[8] motor vehicles made up a large portion of the surplus property set aside for exclusive use for veterans.[9]

The proceedings in the instant case. The Government's complaint, which was filed on August 9, 1950 (R. 1-3), alleged in Count I that during the week of June 17, 1947, at Tinker Field, near Oklahoma City, Oklahoma, petitioner "did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration,

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[6] 32 C.F.R. (1946 Supp.) 8302.8(d), 8302.11. The latter regulation provided:

> Disposal agencies shall fix the fair value at which property shall be acquired by priority claimants. *Such a fair value shall not be greater than the lowest price which is offered to any trade level at the time of acquisition* by the priority claimant, or where the fair value is fixed after examining competitive bids, it shall not be greater than the lowest acceptable bid. [Emphasis added.]

[7] See *e.g.*: H. Rep. No. 1954, 79th Cong., 2d Sess., p. 2; cf. Quarterly Progress Report to the Congress by the War Assets Administration, Second Quarter of 1946, p. 19.

[8] See H. Rep. No. 1954, 79th Cong., 2d Sess., p. 2; 92 Cong. Rec. 4002.

[9] Schedule of Property to be set aside for veterans: Exhibit A following 32 C.F.R. (1946 Supp.) 8302.14.

an agency of the United States Government, for the purpose of obtaining 1 Ross Carrier Company Straddle Truck, model 90-7056, serial 1940 USA 563821" (R. 2).[10] The complaint contained four additional counts, numbered II through V, which are identical with Count I except as to the name of the person whom petitioner had caused to make the false statement and the description of the vehicle involved (R. 2-3). On the basis of the allegations contained in these five counts, the complaint prayed for judgment in the amount of $2,000 for each of the five frauds perpetrated by petitioner upon the War Assets Administration, as provided in Section 26(b)(1) of the Surplus Property Act (*supra*, pp. 2-3), a total of $10,000 plus costs (R. 3).

By its amended answer, petitioner in effect admitted the truth of the allegations in the Government's complaint, but sought to defend on the ground that the Government's action was one for a "statutory penalty" and not "for the collection of any obligation or indebtedness owing to or the recoupment or recovery of damage suffered by the [United States]" (R. 6). The answer alleged that petitioner had previously been indicted for the "identical offenses charged in the * * * complaint * * *" to which it had pleaded *nolo contendere*, and upon which fines in the aggregate amount of $25,000 had been imposed and paid (R. 6-7, 8-11). The answer further averred that peti-

[10] The "false statements" were statements qualifying the persons named in each of the counts as a veteran for a priority right to make the purchase. See R. 7, 18.

tioner's frauds have not caused the Government any damage or loss since it received the full advertised offering price for the trucks and, had the trucks not all been sold to those having claiming priorities, they would have been sold at the same price to non-priority purchasers such as petitioner (R. 7-8).

Thereafter, both parties moved for summary judgment. The Government's motion was on the ground that there was no genuine issue of fact and further that, since the defenses set out in petitioner's answer were insufficient, the Government was entitled to judgment as a matter of law (R. 3-4). Petitioner's motion was based on the claim that the Government's suit, being for a statutory penalty, was barred by the Fifth Amendment's prohibition against double jeopardy (R. 4-5).

The District Court overruled petitioner's motion for summary judgment and granted the Government's motion, holding in effect that the double jeopardy provision of the Fifth Amendment was not applicable to this civil action for damages (R. 12-13). Accordingly, the District Court entered judgment for the Government for $10,000, $2,000 for each of the five frauds practiced by petitioner, plus costs (R. 13). On appeal, the court below affirmed, holding that Section 26(b)(1) was compensatory and not penal, and therefore that the action was not barred by the Fifth Amendment's prohibition against double jeopardy (R. 17-23).

SUMMARY OF ARGUMENT

A

The holding of the court below that the Government's suit under Section 26(b)(1) of the Surplus Property Act, to recover $2,000 for each of petitioner's five frauds, was not barred by the double jeopardy prohibition—because the civil remedy is compensatory and not punitive—is supported, if not required, by several decisions of this Court, particularly *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537. See also, *United States* v. *Weaver*, 207 F. 2d 796 (C.A. 5) (agreeing with the court below). Applying the comparable provision of the False Claims Act, *Marcus* v. *Hess* held that a prior criminal proceeding was no bar to the Government's recovery of $2,000 for each of the false claims filed in that case. The critical facts are the same here and the statutory provisions and their purposes are practically identical.

In addition, the Surplus Property Act and its legislative history show a definite congressional purpose—the governing criterion, under *Marcus* v. *Hess* and *Helvering* v. *Mitchell*, 303 U. S. 391, in characterizing remedies of this general type—to provide a civil compensatory remedy and not merely a penalty or punitive imposition. *Marcus* v. *Hess* having been decided shortly before the enactment of the Surplus Property Act, "we may assume that the framers of § 26(b) were aware of that decision when they formulated § 26(b)" (R. 19). Moreover, since the other subparagraphs of the Section provide plainly compensatory remedies

for violation of the Act, it is highly unlikely that Congress intended to include a punitive sanction in the same section; indeed, Section 26(d) describes 26(b) as providing "civil remedies" and the Senate Committee's report characterizes Section 26 as giving to the United States "the option of electing among three different measures of damages." S. Rep. No. 1057, 78th Cong., 2d Sess., pp. 13-14. Finally, since the Act itself and its legislative history show that Congress intended that suits under Section 26(b) could and would be brought in addition (and not merely as an alternative) to criminal proceedings, the rule that statutes are to be construed to avoid constitutional issues would seem to require that Section 26(b) be held to provide a compensatory remedy, not a penal sanction.

B.

Petitioner's argument that Section 26(b)(1) is penal in the particular circumstances of this case because the frauds asserfedly caused no damage to the Government is based on a misreading of *Marcus* v. *Hess*. That case, as well as *Helvering* v. *Mitchell*, ruled that the issue is whether Congress, anticipating that frauds under the particular statute would generally cause damage, designed a general statutory formula to provide restitution for damage which might well be hard to prove in any individual case; once it is decided that such was the congressional purpose, the remedy applies to all cases under the statute irrespective of their individual facts or of proof of actual

damage. The comparable remedy in the False Claims Act was actually applied in *Marcus* v. *Hess* without regard to a showing of loss.

Similarly, here it is clear that not only did Congress anticipate damage generally from frauds under the Surplus Property Act but that in fact damage and injury to the Government resulted in several ways. And the difficulty of reducing these damages to a monetary equivalent furnishes full justification for the $2,000 provision of Section 26(b)(1). "The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress." *Marcus* v. *Hess*, 317 U.S. at 552.

ARGUMENT

The Government's Suit to Recover Under Section 26(b)(1) of the Surplus Property Act Is Not Barred by the Prohibition Against Double Jeopardy.

This suit was brought by the United States under Section 26(b)(1) of the Surplus Property Act which provides that "every person who shall use or engage in * * * any fraudulent trick, scheme, or device, for the purpose of securing or obtaining * * * for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act * * *" "shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, * * *."

Petitioner in effect admits that it defrauded the

War Assets Administration in connection with certain sales by that agency of surplus motor vehicles in 1947 (R. 6). It, however, seeks to avoid making the payments prescribed by Section 26(b)(1) on the ground that the $2,000 plus double damage provision constitutes a statutory penalty and consequently that, because of the prior criminal proceedings based on the same frauds, the Government is barred from recovering under Section 26(b)(1) by the double jeopardy provision of the Fifth Amendment.[11] This contention is without merit.

A. *Well-Established Principles Support the Holding Below that Recovery by the Government would not Place Petitioner in Jeopardy for a Second Time.*

The decisions of this Court, particularly that in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, leave no doubt that the instant suit does not operate to place petitioner in jeopardy for a second time contrary to the proscription of the Fifth Amendment. For while it is clear that the double jeopardy provision prohibits the imposition of punishment twice for the same offense (see *e. g., United States* v. *LaFranca*, 282 U. S. 568; *Coffey* v. *United States*, 116 U. S. 436; *United States* v. *Chouteau*, 102 U. S. 603), it is equally well settled that the constitutional prohibition is inapplicable where the second proceeding, although based on the same facts, is not penal in nature. See *e. g., United*

[11] "* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *".

States ex rel. Marcus v. *Hess*, 317 U. S. 537; *United States ex rel. Ostrager* v. *Contractors*, 317 U. S. 562; *Helvering* v. *Mitchell*, 303 U. S. 391; *United States* v. *Real Estate Boards*, 339 U. S. 485, 493, fn. 6; *Murphy* v. *United States*, 272 U. S. 630; *Various Items* v. *United States*, 282 U. S. 577; *Boyd* v. *United States*, 116 U. S. 616. Under the latter decisions, particularly *Marcus* v. *Hess*, *supra*, which involved the very same situation and contention by the defrauders as to the comparable provision of the False Claims Act, the right of action vested in the Government by Section 26(b)(1) of the Surplus Property Act constitutes a civil remedy, compensatory in nature. Accordingly, the court below properly held that the instant proceeding does not come under the proscription of the Fifth Amendment.

1. In *Marcus* v. *Hess*, the defendants had pleaded *nolo contendere* to an indictment for conspiracy to defraud the United States and had paid the fines imposed (317 U.S. at 545, 548). After this criminal proceeding, there was instituted against the defendants an action seeking judgment in accordance with the provision of the False Claims Act (Rev. Stat. 5438, 3490, 31 U.S.C. 231), which provides, in language substantially identical to that here involved,[12] that a person who perpetrates certain frauds upon the United States

> * * * shall forfeit and pay to the United States the sum of two thousand dollars, and, in

[12] Rev. Stat. 3490 apparently served as a model for Section 26(b)(1); see *infra*, p. 23.

> addition, double the amount of damages which the United States may have sustained * * * together with the costs of suit.

The defendants argued that the statute under which the action was brought prescribed a penalty and so the prior criminal proceeding, coupled with the prohibition against double jeopardy, precluded assessment of the statutory $2,000 plus double damages for each fraudulent act, as sought in the complaint (317 U.S. at 548).

This Court was unanimous in rejecting these contentions.[13] With the exception of Mr. Justice Frankfurter, who would have based the ruling on this issue on another ground (317 U.S. at 553 ff.),[14] the court was in agreement that the provision of the False Claims Act that the defrauder should "forfeit and pay" $2,000 and double damages for each fraud upon the Government was remedial and

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[13] Mr. Justice Murphy did not participate in the consideration of the case, 317 U.S. 553. The dissent of Mr. Justice Jackson was directed to an issue other than that of the asserted double jeopardy. 317 U.S. at 556-562.

[14] In the view of Mr. Justice Frankfurter, there was no double jeopardy involved because

> * * * where two such proceedings merely carry out the remedies which Congress has prescribed in advance for a wrong, they do not twice put a man in jeopardy for the same offense. Congress thereby merely allows the comprehensive penalties which it has imposed to be enforced in separate suits instead of in a single proceeding. By doing this Congress does not impose more than a single punishment. And the double jeopardy clause does not prevent Congress from prescribing such a procedure for the vindication of punitive remedies. [317 U.S. at 555.]

not penal.[15] Pointing out that the double jeopardy provision applies only to "actions intended to authorize criminal punishment to vindicate public justice" and not to "civil, remedial actions brought primarily to protect the government from financial loss" (317 U.S. at 548-549), the Court quoted from its earlier decision in *Helvering* v. *Mitchell*, 303 U.S. 391, 399, to the effect that (317 U.S. at 549):

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether * * * [the statute in question] * * * imposes a criminal sanction. That question is one of statutory construction.

And with reference to the False Claims Act before it, the Court held (*ibid*):

> It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction. * * * We cannot say that the remedy now before us requiring payment of a lump sum [of $2,000] and double damages will do more than afford the govern-

[15] The holding in *Marcus* v. *Hess* was applied in *United States ex rel. Ostrager* v. *Contractors*, 317 U.S. 562, decided the same day as *Marcus* v. *Hess* and similarly involving the applicability of the double jeopardy provision to an action under the False Claims Act following a criminal proceeding.

ment complete indemnity for the injuries done it.

The Court further elaborated that the $2,000 plus double damage provision of the False Claims Act was enacted by Congress not as a preserver of peace or to vindicate public justice, but in order to protect the property rights of the United States, rights which the Government has just like any other person (at 549-550):

> It is, of course, well accepted that for one act a person may be liable both to pay damages and to suffer a criminal penalty. Long ago, this Court said, "A man may be compelled to make reparations in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance to be twice punished for the same offense." *Moore* v. *Illinois*, 14 How. 13, 19, 20. Congress has "power to give an action for damages to an individual who suffers by breach of the law." *Chattanooga Foundry* v. *Atlanta*, 203 U.S. 390, 396, 397. And it has this same power when it, rather than some private individual, is injured by a fraud. Quite aside from its interest as preserver of the peace, the government when spending its money has the same interest in protecting itself from fraudulent practices as it has in protecting any citizen from frauds which may be practiced upon him. "The powers of the

> United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection." *Cotton* v. *United States*, 11 How. 229, 231.

The opinion concluded on this point (at pp. 551-552):

> It is true that "Punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned," but this is not enough to label it as a criminal statute. *Brady* v. *Daly*, 175 U.S. 148, 157. We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. * * * The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress.[16]

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[16] See also, *United States* v. *Grannis*, 172 F. 2d 507, 511 (C.A. 4), certiorari denied, 337 U.S. 918, where the Court of Appeals for the Fourth Circuit held that "It is clearly established that the defense of double jeopardy is not applicable to civil actions under the federal false claims statute."

As already indicated, *Marcus* v. *Hess* refers to the Court's earlier decision in *Helvering* v. *Mitchell*, 303 U.S. 391. In that case, the defendant, having been acquitted of fraud under the tax laws in earlier criminal proceedings, sought to defeat the Government's subsequent suit for the 50% addendum to the taxes assessed under Section 293 of the Revenue Act of 1928 on the ground that this additional 50% constituted a penalty and hence its recovery by the Government was barred by the double jeopardy prohibition. In rejecting this claim, the Court reaffirmed as long settled "[T]hat acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based" (303 U.S. at 397, see also 303 U.S. at 398-399). The Court then went on to comment (303 U.S. at 401):

> The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud. In *Stockwell* v. *United States*, 13 Wall. 531, 547, 551, the Court said of a provision which added double the value of the goods:
>
> "It must therefore be considered as remedial, as providing indemnity for loss. And it

> is not the less so because the liability of the wrongdoer is measured by double the value of the goods received, concealed, or purchased, instead of their single value. The act of abstracting goods illegally imported, receiving, concealing or buying them, interposes difficulties in the way of a government seizure, and impairs, therefore, the value of the government right. It is, then, hardly accurate to say that the only loss the government can sustain from concealing the goods liable to seizure is their single value, or to assert that the liability imposed by the statute of double the value is arbitrary and without reference to indemnification. Double the value may not be more than complete indemnity * * *.
>
> "The act of 1823 was, as we have seen, remedial in its nature. Its purpose was to secure full compensation for interference with the rights of the United States."

Noting that among the various types of remedial sanction was "the payment of fixed or variable sums of money" (303 U.S. at 400),[17] the Court con-

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[17] Another remedial sanction, "which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted" such as the deportation of aliens and disbarment. 303 U.S. at 399, fn. 2 and cases there cited. See also, *United States* v. *Real Estate Boards*, 339 U.S. 485, 493, fn. 6 ("The fact that in case of corporations dissolution can result from a civil suit under the anti-trust laws does not make the proceeding any the less remedial. The civil suit aims to put an end to the restraint, not to impose punishment for past acts").

cluded that the basic question is one of statutory construction and that the statute and its history indicated clearly that Congress intended a civil remedial, not a criminal penal, sanction (*id.*, at 401-402).

2. The construction accorded by this Court in *Marcus* v. *Hess* to the $2,000 plus double damage provision of the False Claims Act is fully applicable to the virtually identical provision of Section 26(b)(1) of the Surplus Property Act here involved. As in *Marcus* v. *Hess*, the action was brought by the Government not as preserver of peace or to vindicate public justice, but, as held in *United States* v. *Weaver*, 207 F. 2d 796, 797 (C.A. 5), as "a civil action to recover an award of damages of a compensatory nature, payable to the United States for injuries to its property rights." [18]

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[18] The *Weaver* case involved the same basic issue as that presented by the instant case, *i. e.*, whether Section 26(b)(1) of the Surplus Property Act is penal or compensatory. Although the context in which that issue was raised in *Weaver* differs from the present one (in *Weaver*, the ultimate question was whether the action was subject to the statute of limitations for suits for penalties contained in 28 U.S.C. 2462), petitioner has recognized that this difference is immaterial and has invoked as support for its position *United States* v. *Witherspoon*, 211 F. 2d 858 (C.A. 6), where in precisely the same context as *Weaver*, Section 26(b)(1) was held penal. (Pet. 5-6, Br. 9). See *infra*, p. 39, fn. 34.

In fact, as the court below held (R. 21), no distinction flows from the difference, for in both the double jeopardy (involved here) and the limitations situations (involved in *Weaver* and *Witherspoon*), "penalty" is used in the sense of an exaction designed to punish an offense against the public justice. Compare *Marcus* v. *Hess*, 317 U.S. at 548-549, *supra*, p. 16, with *Huntington* v. *Attrill*, 146 U.S. 657, 658, 673-74, 683; *Brady* v. *Daly*, 175 U.S. 148, 156; *Chattanooga*

This is evident from the similarity in purpose of the provisions; both relate to frauds upon the Government, the False Claims Act pertaining to frauds in connection with claims submitted to the Government and Section 26(b)(1) dealing with frauds in procuring property from the Government. Indeed, inasmuch as the strong "forfeit and pay" language of False Claims Act was not deemed by this Court to convert the $2,000 plus double damages provision of that Act into a penalty,[19] it would seem, as the court below held (R.

Foundry v. *Atlanta*, 203 U.S. 390, 397; *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U.S. 412, 423 (all but one of which cases were referred to in *Marcus* v. *Hess*). This is the sense that "penalty" is given generally under federal law. *Huntington* v. *Attrill*, *supra* (conflicts of laws); *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265 (conflicts of laws); *James-Dickinson Co.* v. *Harry*, 273 U.S. 119, 126 (conflicts of laws); *Sullivan* v. *Associated Billposters and Distributors*, 6 F. 2d 1000, 1009 (C.A. 2) (abatement); *Barnes Coal Corp.* v. *Retail Coal Merchants Ass'n*, 128 F. 2d 645 (C.A. 4) (abatement); *United States* v. *Grannis*, 172 F. 2d 507, 514 (C.A. 4), certiorari denied, 337 U.S. 918 (abatement); *Robertson* v. *Argus Hosiery Mills*, 121 F. 2d 285 (C.A. 6), certiorari denied, 314 U.S. 681 (jurisdiction under 28 U.S.C. 1355); *Fields* v. *Washington*, 173 F. 2d 701 (C.A. 3) (jurisdiction under 28 U.S.C. 1355); *Currie* v. *Flack*, 190 F. 2d 549 (C.A. 1) (jurisdiction under 28 U.S.C. 1355); *Cox* v. *Lykes Brothers*, 237 N.Y. 376, 143 N.E. 226 (jurisdiction under 28 U.S.C. 1355); *Crary* v. *Porter*, 157 F. 2d 410, 413-414 (C.A. 8) (self-incrimination); *Schinkal* v. *United States*, C.A. 9 No. 14313 (decided September 20, 1955), (self-incrimination).

[19] In regard to the "forfeit and pay" language of the False Claims Act the Court commented (317 U.S. at 551):

> It is argued that the $2,000 "forfeit and pay" provision is "criminal" rather than "civil," even if the double damage feature is not. The words "forfeit and pay" relate alike to the $2,000 sum and the double damages.

20), that the milder requirement of "pay" imposed by Section 26(b)(1) would *a fortiori* militate against petitioner's construction.

Moreover, in view of the express ruling in both *Marcus* v. *Hess* and *Helvering* v. *Mitchell* that the problem of the nature of remedy is basically one of statutory construction, and of ascertaining the legislative intent, it is important to note that *Marcus* v. *Hess* was decided in January 1943, shortly before the enactment of the Surplus Property Act of 1944 on October 3, 1944. In these circumstances, "we may assume that the framers of § 26(b) were aware of that decision when they formulated § 26(b)" (R. 19), and, consequently, that by carrying over into Section 26(b)(1) the provisions of the False Claims Act construed as compensatory in *Marcus* v. *Hess*, Congress intended Section 26(b)(1) similarly to provide a civil compensatory remedy.

That Congress intended Section 26(b)(1) to

The use of the word "forfeit" in conjunction with the word "pay" does not force the conclusion that the provision is criminal. No one doubts that Congress could have accomplished the same result by authorizing "double" or "quadruple" or "punitive" damages or a lump sum payment for attorney's fees, or by definition of the elements of "actual damages." Special consequence cannot be drawn from the use of the word "forfeit." While this might under other circumstances be an appropriate word to suggest a fine upon the failure to pay which an individual might be imprisoned, no such punishment is provided here upon default in payment. The words "forfeit and pay" are wholly consistent with a civil action for damages. *Atchison, T. & S. F. Ry. Co.* v. *Nichols*, 264 U.S. 348, 350-352; cf. *Hepner* v. *United States*, 213 U.S. 103, 104-111.

be compensatory is also manifest from the face of the Act. Section 26(b), *supra*, p. 3, explicitly describes subsection (b) as providing "civil remedies." In addition, subparagraphs (2) and (3) of that Section, providing only for multiple damages, plainly are compensatory in nature (see, *infra*, p. 38, fn. 32), and it is unlikely that Congress would include a punitive sanction and two compensatory remedies in the same section.

Any doubt as to the congressional intent is dissipated by the legislative history. In its report on S. 2065, 78th Cong., 2d Sess., the bill which, as subsequently amended, became the Surplus Property Act of 1944,[20] the Senate Committe on Military Affairs described the provisions of what was then Section 23(b) as dealing (S. Rep. No. 1057, 78th Cong., 2d Sess., pp. 13-14).

> * * * with the civil liability of persons who engage in false, fraudulent, or fictitious activities, or conceal or misrepresent material facts, or act with intent to defraud the United States, or who enter into an agreement or conspiracy or cause other people to do any of the foregoing. The United States is given the option of electing among three different measures of damages—
>
> (1) Any person engaged in such activities

[20] While the bill enacted was designated H.R. 5125, the Senate, after considering S. 2065, struck everything after the enacting clause of H.R 5125 as it passed the House and substituted therefor the text of the Senate bill, as amended. 90 Cong. Rec. 7330.

can be sued for the sum of $2,000 for each such act, plus twice the amount of any damage sustained by the United States, plus the cost of suit.

(2) The United States may recover from such person twice the consideration which he agreed to give to it.

(3) The United States may keep the property acquired by reason of the above-described fraudulent activities, plus the consideration given to it for that property.

Plainly, Congress viewed all three subparagraphs of Section 26(b) as in *pari materia* and, of particular significance here, viewed subparagraph (1), as well as the other subparagraphs, as compensatory in nature.

Finally, Section 26(d) *supra*, p. 3, expressly provides that the "civil remedies provided in [Section 26] shall be in addition to all other criminal penalties and civil remedies provided by law." In the same vein, the report of the Senate Committee points out (S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14):

> * * * these provisions are exclusive of any other civil remedies which the United States may have and of such provisions of the Criminal Code as relate to fraud (18 U.S.C. sec. 80) and conspiracy (18 U.S.C. sec. 83).

It is apparent that not only did Congress intend actions under Section 26(b) to be in addition,

not an alternative, to criminal proceedings but also that it contemplated the very situation which is here presented—a prior criminal proceeding under 18 U.S.C. 80 (R. 8; Pet. Br. 4, fn. 2)—and which petitioner claims as the basis for the outlawry of the present action by the proscription against double jeopardy. Furthermore, since it would be unconstitutional to apply Section 26 (b)(1) in these circumstances (specifically envisaged by Congress) if it were construed as penal (*Helvering* v. *Mitchell*, *supra*, at 401; *United States* v. *LaFranca*, 282 U.S. 568; *Coffey* v. *United States*, 116 U.S. 436) but there is no such problem if Section 26(b)(1) is held to be compensatory, the rule that statutes are to be construed to avoid constitutional issues (see, *e.g.*, *Murphy* v. *United States*, 272 U.S. 630, 632; *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 120, 121; *Guessefeldt* v. *McGrath*, 342 U.S. 308, 319) would seem particularly applicable.

Petitioner's reliance on this Court's earlier opinions in *Coffey* v. *United States*, 116 U.S. 436, and *United States* v. *LaFranca*, 282 U.S. 568, is misplaced (Br. 10). In addition to the doubtful validity of *Coffey* (see, *e.g.*, *Various Items* v. *United States*, 282 U.S. 577; *United States* v. *One Dodge Sedan*, 113 F. 2d 552, 553 (C.A. 3); *United States* v. *Gramer*, 191 F. 2d 741, 743 (C.A. 9)), it should be noted that (1) the defrauders invoked these cases—without success—in *Marcus* v. *Hess* and *Helvering* v. *Mitchell* (Brief for Respondents in No. 173, Oct. Term, 1942, pp. 80 ff.; Brief for Respondent in No. 324, Oct. Term, 1937, pp. 6, 7, 15,

26, 36); (2) that the Second Circuit, in arriving at its holding in *Mitchell* that the double jeopardy provision was applicable, likewise relied upon these cases (89 F. 2d 873, 878; see 303 U.S. at 405-406); and (3) that in *Mitchell* this Court expressely held these cases inapplicable, reasoning that "[s]ince we construe [the statute] as imposing a civil administrative sanction, neither case presents an obstacle to the recovery of * * * the 50 per centum addition here in issue" (303 U.S. at 406); see also *Marcus* v. *Hess, supra,* at p. 554 (concurring opinion of Frankfurter, J.). Similarly, these cases present no obstacle to the Government's recovery in the instant case, since as we have shown above, Section 26(b)(1) is compensatory, not penal.

B. *The Fact that no Damages Were Alleged Does Not Convert the Suit into an Action for a Penalty.*

Asserting that its answer "pleaded facts showing that the Government suffered no damage or loss from the sale of such trucks, having received the full advertised offering price" (Br. 7), petitioner urges that for that reason the instant proceeding must be for a penalty under the principles enunciated in *Marcus* v. *Hess*. This, petitioner reads, as holding that the Goverment's recovery of the statutory sum is compensatory only where "the facts involved in a particular case" show actual damage to the Government (Br. 10). Consequently, petitioner claims, while the Government suffered damages justifying civil recovery in both

Marcus v. *Hess* and *Helvering* v. *Mitchell*; there is no such basis for recovery of compensation here and hence the Government's action under Section 26(b)(1) could only be for a penalty.

1. Petitioner's argument is based on a misreading of *Marcus* v. *Hess*, as well as of *Helvering* v. *Mitchell*. As shown above, the opinion in both cases made it clear that the issue whether the statutory remedy is penal or compensatory is one of general construction and intent, not dependent upon whether actual damages could or would be proved in a particular case. In other words, *Marcus* v. *Hess* held that Congress anticipated that frauds would result in damage to the Government and, since some of these damages might not be reducible to a monetary equivalent, it provided the statutory formula to assure full recovery. "We think," the Court said, "the chief purpose of the statutes here was to provide restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole * * *. The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress," 317 U.S. at 551-552.[21] In these circumstances, the ex-

[21] The Court also said (317 U.S. at 550-1):

> * * * Congress might have provided here as it did in the anti-trust laws for recovery of "threefold damages . . . sustained and the cost of suit, including a reasonable attorney's fee." * * * Congress could remain fully in the common law tradition and still provide punitive damages. "By the common as well as by statute law, men

tent of actual recoverable damages suffered in a particular case is irrelevant, a conclusion fully supported by the statutory language that the Government is to recover "the sum of two thousand dollars, *and, in addition,* double the amount of damages which the United States may have sustained" (emphasis added). See *United States* v. *Rohleder*, 157 F. 2d 126, 129 (C.A. 3).

In this respect, the statutory provision for the Government's recovery is comparable to a contractual provision for liquidated damages, as to which this Court said in *Priebe & Sons* v. *United States*, 332 U.S. 407, 411-412:

> * * * When they are fair and reasonable attempts to fix just compensation for anticipated loss caused by breach of contract, they are enforced. * * * They serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts. * * * And the fact that the damages suffered are shown to be less than the damages contracted for is

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are often punished for aggravated misconduct or lawless acts by means of civil action and the damages inflicted by way of penalty or punishment given to the party injured." * * * This Court has noted the general practice in state statutes of allowing double or treble or even quadruple damages. * * * Punitive or exemplary damages have been held recoverable under a statute like this which combines provision for criminal punishment with others which afford a civil remedy to the individual injured. * * * The law can provide the same measure of damage for the government as it can for an individual.

not fatal. These provisions are to be judged as of the time of making the contract.[22]

That the holding in *Marcus* v. *Hess* was not intended to apply only in those cases in which the Government is shown to have suffered specific damage is further evidenced by the fact that, although the District Court's opinion in that case shows that some of the fraudulent acts were detected at the inception and no actual damage was suffered by the Government with respect to several contracts (41 F. Supp. 197, 218 (W.D. Pa.)),[23] this Court did not differentiate these frauds but rejected the defrauders' claim of double jeopardy with respect to *all* the fraudulent acts. See *United States* v. *Rohleder*, 157 F. 2d 126, 129 (C.A. 3). Mr. Justice Frankfurter so understood the Court's opinion.[24]

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[22] See, also *Sun Printing & Pub. Assn.* v. *Moore*, 183 U.S. 642, 672-674; *United States* v. *Bethlehem Steel Co.*, 205 U.S. 105, 121; *Clydebank Engineering & Shipbuilding Co.* v. *Castaneda* [1905] A.C. 6, 11-13, 20; *United States* v. *Walkof*, 144 F. 2d 75, 77 (C.A. 2).

[23] "The next reason urged by defendants for a new trial is that the court erred in refusal of defendants' 9th point, which reads as follows: '9. There can be no recovery of any penalty or forfeiture on account of any project in which no actual damages have been shown.' Section 3490, R.S., expressly provides for a penalty of $2,000, 'and, in addition, double the amount of damages which the United States may have sustained.' This makes it plain that regardless of damages sustained, the United States would still be entitled to recover the penalty. This point refers to instances where the United States withheld payments on account of the discovery of the fraud, so that no actual damage was shown. However, that would not preclude the United States from recovery of the penalty prescribed by Section 3490, R.S."

[24] In his concurring opinion, Mr. Justice Frankfurter criticized the Court for not allowing "[t]hose who invoke the

The courts of appeals have also read *Marcus* v. *Hess* as giving a general construction of the statute, not limited to particular cases in which damages are proved. *United States* v. *Grannis*, 172 F. 2d 507, 511 (C.A. 4), certiorari denied, 337 U.S. 918; *Murray & Sorenson, Inc.* v. *United States*, 207 F. 2d 119, 123 (C.A. 1).

2. Since the Surplus Property Act of 1944 dealt with the disposal of all kinds and manner of surplus equipment and property, real and personal, ranging up to war plants, ships, strategic minerals, airports, aircraft, harbor and port terminals (see 58 Stat. 765 *ff.*),[25] it would seem clear that the dam-

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Constitution, as do the respondents here * * * to prove that, as a matter of fact, the forfeiture and the double damages are punitive because they exceed any amount that could reasonably be regarded as the equivalent of compensation for the Government's loss" (317 U.S. at 554).

[25] As noted by the Senate Committee on Military Affairs (S. Rep. No. 1057, 78th Cong., 2d Sess., pp. 2-3):

> * * * Estimates of the value of surplus Government-owned property available for distribution at the end of the war vary from 50 billion dollars to 112 billion. Of course, the bulk of this material will consist of weapons of war unsuitable for any peacetime use. However, it is certain that there will be many billions of dollars of consumers' goods available to supply the accumulated demand of war-imposed civilian shortages; to provide a large part of this Nation's contribution to foreign relief; and to stimulate new demands for new civilian-type products, largely unknown, or at least unavailable to civilians in pre-war times.
>
> At least a third, and probably more, of the Government's $15,000,000,000 investment in plants and equipment will be convertible to peacetime uses. The disposition of the Government-owned plants constructed to supply the expanded need for steel, light metals, chemicals, synthetic rubber, and high-octane gasoline will have

ages likely to result to the Government from frauds committed in connection with the disposal of such property would be at least as extensive and difficult of exact proof as those resulting from the frauds dealt with in the False Claims Act. Thus, the Surplus Property Act's provision for $2,000 plus double damages for each fraudulent act, like the comparable provision of the False Claims Act, constitutes a reasonable measure, in general, of the foreseeable damage to the Government. As was stated in *United States* v. *Weaver* 207 F. 2d 796, 798 (C.A. 5):

> The intent and purpose of the Surplus Property Act of 1944, 58 Stat. 756, were to facilitate and regulate the orderly disposal of surplus property of the United States, including the giving of an opportunity to returning veterans to establish themselves in business, agriculture, or professional life. There can be no doubt that the property rights of the United States were injured as a result of the acts alleged in the complaint. Section 26(b)(1) seeks to indemnify the United States for such injuries. It provides for payment to the United States of an amount not so dispro-

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a profound effect on the future industrial structure of the Nation. In addition to these integrated facilities, the Government has several billions of dollars invested in such equipment as machine tools, whose wartime production amounts to 20 years' normal supply, and in structures which may, if properly used, house the thousands of new enterprises needed to supply peacetime employment to millions of war workers.

portionate to the actual injury that it cannot be deemed wholly compensatory. * * *

Petitioner's claim that its frauds caused the Government no damage overlooks the fact that the Government intended to sell the surplus motor vehicles in the prescribed order of priority under which dealers such as petitioner were at the bottom of the list; that at the time these sales were made (shortly after the termination of active hostilities in World War II) there was an acute shortage of motor vehicles; that the Government wished to accord a priority to purchase surplus motor vehicles to certified veterans in order to aid them in their reassimilation into civilian life; and consequently that the prices and conditions under which the Government was willing to make these sales to these veterans were far more favorable to them than those generally prevailing in the market place.

In order to help certified veterans in their readjustment to civilian life, the Government was willing to sell these vehicles to them at a price substantially lower than that which the vehicles would bring in the open market. See, *supra*, p. 7, fn. 6. However, the Government was not willing to sell these motor vehicles generally to those not entitled to priority, and even if it were, there is no indication that it would have been willing to sell the vehicles generally at the same price and under the same conditions.[26] In these circum-

[26] Petitioner's allegations that under the advertisement and

stances, petitioner's fraudulent masquerade as various veterans had the effect not only of inducing the Government to sell the vehicles to persons with whom it had no intention of dealing[27] but also of selling the vehicles at lower than market prices to persons not entitled to priority for pur-

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order of sale, any vehicles left over after all priorities were satisfied would be sold to non-priority purchasers such as petitioner, fail to recognize the realities of the situation then prevailing. The shortage of civilian vehicles was so acute in 1946-1947 that there were not enough surplus vehicles to satisfy the needs of all priority holders. The result was that it was an extremely rare situation that vehicles were sold to non-priority purchasers. In this connection, it is significant that petitioner nowhere claims or even suggests that the price at which the vehicles were sold by the Government was the price then prevailing in the market, whether legitimate, gray or black; in contrast, the fact that petitioner was willing to resort to fraud to obtain these vehicles strongly indicates that the Government's selling price was below market and that petitioner expected to profit, probably substantially, on the resale. At this point, it should also be recalled that among the stated purposes of the Surplus Property Act were the discouragement of disposal of surplus property to speculators and the prevention of the making of unusual and excessive profits. *Supra*, pp. 4-5.

[27] It is well established that a seller has the right to select his purchaser (*Federal Trade Commission* v. *Raymond Co.*, 263 U.S. 565, 573; *Green* v. *Victor Talking Machine Co.*, 24 F. 2d 378, 382 (C.A. 2), certiorari denied, 278 U.S. 602), and the law will protect a seller who has been misled into making a sale by virtue of the purchaser's false representation that he belongs to a class with whom the vendor is willing to deal or that he does not belong to a group with whom the seller is unwilling to have any dealings. *Gordon* v. *Street* [1899] 2 Q.B. 641 (C.A.); cf. *Smith* v. *Wheatcroft*, 9 Ch. Div. 223; *Popham* v. *Eyre*, Lofft 786, 98 Eng. Rep. 919 (Ch., 1774); *Hedden* v. *Griffin*, 136 Mass. 229.

poses not within the stated priorities. Plainly, this caused damage to the Government and its interests.

In addition, by fraudulently procuring the vehicles, petitioner reduced the number of surplus vehicles in the hands of the War Assets Administration. As a result, some government agency which was entitled to priority might very well have been unable to purchase vehicles which it needed from War Assets Administration and so compelled to purchase vehicles at the higher market price. While Congress was agreeable to that result as far as veterans were concerned, it intended that government agencies have top priority—after veterans—to guard against precisely such a result as far as other purchasers were concerned.[28] As stated in S. Rep. No. 1142, 79th Cong., 2d Sess., on the bill according top priority to veterans (at pp. 1-2):

> The committee amendment still continues the general first priority extended to Government agencies. It should be noted that the purpose of this priority is to save the Government money where one Government agency has surplus equipment which another Government agency requires for the discharge of its responsibilities. If the veterans' preference were advanced to outrank the Federal Government priority, the Federal Government might be compelled in many instances to purchase in the open market the same or similar goods as

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[28] For the order of priority, see the Statement, *supra*, pp. 5-6.

those which were disposed of as surplus by the War Assets Administration.

Thus, petitioner's frauds had the effect of reducing the number of vehicles available to priority holders, including government agencies, and so might very well have caused damage to the Government on this additional score.

Finally, it is settled that the Government is entitled not only to recovery of its actual losses but also to reimbursement of the costs incurred in connection with the ferreting out and investigating the frauds. In *Helvering* v. *Mitchell*, *supra*, at 401, this Court held that the additional tax of 50% imposed in the case of a tax fraud was of a remedial nature "to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."[29] Similarly, *Stockwell* v. *United States*, 13 Wall. 531, had stressed (at 547):

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[29] While petitioner urges that its answer negates damage to the Government, examination thereof indicates that it does not completely do so. The pertinent allegation of the answer is to the effect (R. 8; see also, *supra*, p. 9):

> That by reason of the facts above set forth, the plaintiff was not damaged and did not suffer any loss because of the sale of said trucks and received the full advertised offering price for the same, and had said trucks not been sold to the persons who purchased them, they would have been sold at the same price to other priority or non-priority purchasers.

This allegation attempts to negate only out-of-pocket damages stemming from the sales themselves and in no way denies that the Government incurred costs in connection with ferreting out the frauds, for which it is entitled to reimbursement as set out in the text.

> * * * It is, then, hardly accurate to say that the only loss the Government can sustain from concealing the goods liable to seizure is their single value, or to assert that the liability imposed by the statute of double the value is arbitrary and without reference to indemnification. Double the value may not be more than complete indemnity.

Although the Government was damaged in several ways in the instant case, it is difficult, if not impossible, to reduce the injury to a monetary equivalent.[30] This does not mean, however, that the exaction of the prescribed sum of $2,000 was intrinsically a provision for a penalty. To the contrary, it furnishes the *raison d'etre* for the damage formulae of Section 26(b). In cases involving actionable wrongs the injured party is frequently confronted with serious difficulties in establishing the full extent of the injuries suffered by him and in proving their monetary equivalent.[30] Cf. *Woolworth Co.* v. *Contemporary Arts*, 344 U.S. 228, 232.[31] "The most elementary conceptions of jus-

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[30] This very uncertainty as to the amount which would give full restitution has been the reason why liquidated damage provisions, particularly in government contracts, have been sustained. See, *supra*, pp. 29-30.

[31] In the *Woolworth* case, the Court upheld an award of damages in the amount of $5,000, the maximum allowed by statute for infringement of copyright "in lieu of actual damages and profits", notwithstanding the facts that the infringer showed that its actual profits from the infringement were about $900 and the record failed to show an actually-sustained damage by the copyright owner.

tice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 265, and cases there cited. In *Brady* v. *Daly,* 175 U.S. 148, where a statutory minimum damage for copyright infringement was attacked as penal, the Court ruled (at p. 154):

> * * * In the face of the difficulty of determining the amount of such damage in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. * * * The person wrongfully performing or representing a dramatic composition is, in the words of the statute, "liable for damages thereof." This means all the damages, that are the direct result of his wrongful act. The further provision in the statute, that those damages shall be at least a certain sum named in the statute itself, does not change the character of the statute and render it a penal instead of a remedial one. * * *

For these reasons, statutes which provide for multiple,[32] lump sum,[33] or minimum damages have

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[32] *Stockwell* v. *United States,* 13 Wall. 531, 547, 551; *Overnight Motor Co.* v. *Missel,* 316 U.S. 572, 583-4; *Cox* v. *Lykes Bros.,* 237 N.Y. 376, 143 N.E. 226; *Currie* v. *Flack,* 190 F. 2d 549 (C.A. 1); *Helvering* v. *Mitchell,* 303 U.S. 391, 401; *Calvin* v. *Huntley,* 178 Mass. 29.

[33] *Atchison, Topeka & Santa Fé Ry.* v. *Nichols,* 264 U.S. 348, 351; *Douglas* v. *Cunningham,* 294 U.S. 207; *Woolworth Co.* v. *Contemporary Arts,* 344 U.S. 228.

been upheld and applied as properly compensatory.[34]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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[34] *United States* v. *Witherspoon*, 211 F. 2d 858 (C.A. 6), relied on by petitioner (Br. 9), while opposed to our position, is, we believe, incorrectly decided. In that case, which involved the same situation as the *Weaver* case, the Court of Appeals for the Sixth Circuit ruled that Section 26(b)(1) was penal, subject to the limitation provision of 28 U.S.C. 2462. See *supra*, p. 21, fn. 18. However, the Sixth Circuit went on to rule that the War Time Suspension of Limitations Act was applicable to those frauds which occurred before December 31, 1946. As a result, when *Witherspoon* was decided on March 22, 1954, suits under Section 26(b)(1) for such frauds were still not time barred. Cf. *United States* v. *Smith*, 342 U.S. 225; *United States* v. *Grainger*, 346 U.S. 235, 240-248.

Apart from the fact that the *Witherspoon* opinion merely states its conclusion without supporting reasoning or rationale, it is noteworthy, as the court below commented, that "the opinion made no mention of *Helvering* v. *Mitchell*, *supra*, or *Marcus* v. *Hess*, *supra*, nor why these decisions which we regard as persuasive, were regarded by that court as inapplicable" (R. 21, fn. 2). These cases were urged upon the Sixth Circuit by the Government as was *Weaver*, and as to the latter, the only recognition accorded by the Sixth Circuit was its bare citation preceded by "But see contra" (211 F. 2d at 861).

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